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ACCOUNT STATED:

1. Where a statement of account is rendered to a debtor who keeps it for a long time without objection, it becomes an account stated, and cannot be opened except for substantial error, mistake, omission or fraud. *Gooch* v. *Vaughan*, 610.
2. In opening the account for any of these causes the burden of proof is on the debtor. *Ibid.*

ACTION TO RECOVER LAND:

1. Where in an action to recover land, the defendant failed to file a bond to secure costs and damages as required by *The Code*, sec. 237, it is error to strike out the answer on a motion made at the trial term, without giving the defendant an opportunity to file a bond at that time. *McMillan* v. *Baker*, 110.
2. The bond under this section of The Code is for the benefit of the plaintiff, and he can waive it, and will be deemed to have done so, if he allows a number of terms of court to pass without demanding it. If not waived entirely, it is waived until demanded. *Ibid.*
3. An order of the Superior Court, striking out an answer in an action of ejectment for want of a bond by the defendant, is reviewable, where the defendant has been led to assume that the plaintiff has waived the bond. *Ibid.*
4. A tenant cannot contest his landlord's title until he has given up the possession of the land. *James* v. *Russell*, 194.
5. The second story in a house, when held separately, may be recovered in an action of ejectment. *Asheville Div.* v. *Aston*, 578.
6. The owner of an equitable estate may bring an action in the nature of ejectment, under The Code system of proceedure. *Taylor* v. *Eatman*, 601.

ADJOURNMENT OF COURT:

1. A pleading placed on the files of the Court after the Judge has left for the term, is not filed in contemplation of law. *Foley* v. *Blank*, 476.
2. When the Judge presiding leaves a court finally before the term has expired, he should have it adjourned and not leave it open to take care of itself. Such practice has no legal sanction, and it gives rise to misapprehension, confusion and wrong. *Ibid.*
3. Until the term expires, there is no final determination of the cause, so that the case on appeal need only be filed within five days after the end of the term at which judgment is rendered. *Turrentine* v. *The Railroad*, 642.

ADMINISTRATOR:

1. An administrator has no power to rescind a contract to purchase land, made by his intestate. *Owens* v. *Phelps*, 231.

2. Where in an action brought to declare such attempted rescission a nullity, it appeared that the vendor had paid to the administrator a sum of money for which the rescission was the consideration; *Held*, that the administrator had such an interest as made him incompetent to testify. *Ibid.*

3. The plaintiff administrator alleged that under a parol contract to purchase certain lands, his intestate had paid a portion of the purchase money, and prayed judgment against the defendants for the amount so paid. The defendants, by their answer, admitted the contract substantially as set out in the compiaint; *Held*, that the action must be dismissed. *Syme* v. *Smith*, 338.

4. In an action brought by an administrator on notes given by some of the distributees for articles purchased at the administrator's sale, the declarations of the administrator, at the time when the notes were given, that he would only be obliged to collect a portion of the notes, as the estate owed only a small amount of debt, are inadmissible. *Ijames* v. *McClamroch*, 362.

5. All that is required of an administrator in the management of his intestate's estate is diligence and fidelity. If coercive measures vigorously pushed against a debtor are likely to result in a loss to the estate, he is not required to adopt them. *Torrence* v. *Davidson*, 437.

6. An administrator is never held responsible because the exercise of a reasonable discretion has turned out unfavorably for the estate. *Ibid.*

7. The fact that an administrator has a common interest in the estate with the distributees is a circumstance tending to show the exercise of fidelity in the management of the estate. *Ibid.*

8. An administrator cannot be charged with interest at eight per cent., because he is indebted to the estate and has realized that rate on money of his own. *Grant* v. *Edwards*, 442.

9. A commission of 5 per cent. will sometimes be allowed. *Ibid.*

10. Where an administrator is distributee, and owes debts to the estate, the debts must be taken from his distributive share. *Grant* v. *Edwards*, 447.

11. In 1869, the plaintiff's intestate obtained judgments against the ancestor of the defendants, on debts contracted in 1866, and a homestead was allotted to the defendant, which, at his death, was re-allotted to his infant children, the present defendants. A petition was filed by the debtor's administrator to sell the homestead to make assets to pay the judgments; *Held*, 1st, that by assenting for so long a time to the homestead allotment, and by availing themselves of the provision of the statute, which prevented their judgments from being barred, the creditors were precluded from denying the right of the infants to the homestead; 2d, that the creditors were entitled to have the reversion after the determination of the homestead, not the absolute estate in the land, sold to pay their debts. *Cobb* v. *Halyburton*, 652.

12. Where an administrator dies, no one but an administrator *de bonis non* of his intestate can call his estate to account for the assets of his intestate. *Merrill* v. *Merrill*, 657.

13. Where a suit was pending by the next of kin against an administrator for the distribution of the estate in his hands, and the defendant died, *It was held*, that after such death the next of kin cannot maintain the action, and further that the court had no power to allow an administrator *de bonis non* to be made a party plaintiff in the pending action. *Merrill* v. *Merrill*, 657.

14. Land is not assets until it is sold and the proceeds received by the personal representative. *Wilson* v. *Bynum*, 717.

15. *Quære*—Whether an administrator can be sued on his bond when he has been negligent in not obtaining an order to sell his intestate's land for assets. *Ibid.*

16. Where it is necessary, and the administrator fails to take the proper steps to sell his intestate's real estate for assets, he may be compelled by the clerk to do so, or a creditor may file a creditor's bill in the Superior Court against the administrator or executor, and the heirs-at-law or devisees, for the sale of the land. *Ibid.*

ADVANCEMENT:

1. When a father, having several children, conveys a valuable tract of land to one for a nominal consideration, the presumption is, that he intends it as an advancement and to be accounted for as such. *Harper* v. *Harper*, 300.

2. Either party may introduce evidence to support or rebut this presumption. *Ibid.*

ADVERSE POSSESSION:

1. In case of common possession by two persons, the ownership draws to it the possession, and it is presumed to be in him who has the title. So where a ward resided with his guardian on a tract of land in which he had an interest as tenant-in-common, his possession is presumed to be in accordance with his title, and there is no adverse possession against him. *Gaylord* v. *Respass*, 553.

2. A deed conveying a life-estate is color of title, and when accompanied by adverse possession for the required time, will ripen into a good title to the life-estate so granted. *Staton* v. *Mullis*, 623.

3. When the plaintiff claims under a deed purporting to convey the land in dispute, and shows an apparently adverse possession, the burden of proof is on the defendant to show that such possession is not adverse; and, when he claims a reversionary estate after a life-estate, that such life-estate determined too short a time before the bringing of the action to bar his right. *Ibid.*

4. Where A, having a life-estate, conveys to B in fee, who conveys to C, the reversioner or remainderman does not have a right of action until the death of the life tenant. At his death, the possession becomes adverse, and will ripen into a good title by seven years' possession, the title being out of the State. *Ibid.*

5. Possession by a grantee of any part of the land described in his deed, is constructive possession of the entire tract against all persons, except a party having a superior title to the part of which there is only constructive possession. *Ibid.*

AGENT.

1. Where an agent exceeds his authority, his principal must either wholly ratify or wholly repudiate the transaction. He cannot ratify that portion of the contract which is beneficial to him, and repudiate the remainder. *Rudasill* v. *Falls*, 222.

2. The contents of a letter written to the plaintiff by his agent and carried by the defendant, but of which he was ignorant, are not competent evidence on the trial, though material to the issue. *Simmons* v. *Mann*, 12.

3. Where A, as the agent of B to collect a debt from C, borrows money for C, with which to pay the note, the debt to A is extinguished as soon as the money comes into his agent's hands. *Grandy* v. *Abbott*, 33.

4. This principle, however, does not extend to the agent of several principals, one of whom owes the other. *Ibid*, 33.

5. Where the only evidence to show an agency was that some money belonging to the alleged principal had been paid to the party sought to be proved an agent, and the alleged agent had done sundry acts of kindness for the alleged principal; *Held*, no evidence to show an agency. *Fortescue* v. *Makeley*, 56.

6. Where one stands silently by and hears a contract made for him by another, he is bound by such contract. *James* v. *Russell*, 194.

7. A husband may be the agent of his wife. *Harper* v. *Dail*, 394.

8. Where concurrent insurance is effected in different companies, all represented by the same general agent, an examination and valuation made by a subordinate agent of one of the insurers, is admissible in evidence against all who act on his report, and the same rule applies to successive insurance in different companies. *Dupree* v. *Ins. Co.*, 417.

9. Authority delegated by a creditor to an agent to collect and settle a debt, leaves the medium of payment largely at the agent's discretion, but it does not extend to a settlement which the debtor knows will enure entirely to the benefit of the agent. *Williams* v. *Johnston*, 532.

10. An attorney for a foreign corporation, who has claims to collect for them in this State, is not a local agent upon whom process can be served. *Moore* v. *The Bank*, 590.

11. A local agent of a foreign corporation, upon whom process can be served so as to bring the corporation into court, means an agent residing either permanently or temporarily in this State for the purpose of his agency, and does not include a mere transient agent. *Ibid.*

12. A power to act for another, however general its terms or wide its scope, can not be enlarged into a power to pervert funds coming into the agent's hands, without clear approval or ratification by the principal. *Williams* v. *Whiting*, 683.

13. When defendant swore that he sent his wife to a person to borrow money with which he paid for the property alleged to have been stolen, having thus made her his agent, it is competent for the State to prove what the wife said to this person when she got the money as to the purpose it was intended to serve. *State* v. *Lemon*, 790.

AGRICULTURAL LIEN:

Where a tenant makes an agricultural lien, and afterwards the land is sold under execution as the property of the landlord; *It is held*, that the owner of the lien has a right to the crop superior to the purchaser at execution sale. *Dail* v. *Freeman*, 351.

ALIMONY:

1. In applications for alimony, under The Code, §1291, it is competent for the husband to controvert the allegations of the complaint by affidavit or answer, and the judge must find the facts, and set them forth in the record. *Lassiter* v. *Lassiter*, 129.
2. Where the facts as found by the judge, would, if found by the jury on the final hearing, warrant a divorce from bed and board, they *per se* constitute sufficient ground to award alimony *pendente lite*. *Ibid.*
3. Condonation is forgiveness upon condition, and the condition is that the party forgiven will abstain from like offences afterwards. If the condition is violated, the original offence is revived. *Ibid.*
4. Much less cruelty or indignity is sufficient to revive transactions occurring before condonation, than to support an original suit for divorce. *Ibid.*
5. In an application for alimony it need not be found as a fact that the plaintiff was a faithful, dutiful and obedient wife. *Ibid.*

AMENDMENT:

1. The power of a court to amend its records at a subsequent term is essential, and such amendment should not be made by simply noting the order to amend, but it should be actually made by correcting the minutes of the former term. *McDowell* v. *McDowell*, 227.
2. Allowing an amendment to a petition for a *recordari* is matter of discretion, and cannot be reviewed on appeal. *Pritchard* v. *Sanderson*, 41.
3. The jurisdiction of the Superior Court in appeals from a justice of the peace is entirely derivative, and if the justice had no jurisdiction in the action as it was before him, the Superior Court can derive none by amendment. *Ijames* v *McClamroch*, 362.
4. The Court has no power to convert a pending action that cannot be maintained, into a new one, by admitting a new party plaintiff, who is solely interested, and allowing him to assign a new cause of action. *Merrill* v. *Merrill*, 657.
5. Where notice of the attachment is omitted from the order of publication, but in the published notice the defendant is informed that an attachment has been issued against his property, to what court it is returnable, &c., the court has power to amend the order of publication, so as to insert a requirement that notice be given of the attachment. *Bank* v. *Blossom*, 695.
6. *Quære*—Whether such amendment is necessary. *Ibid.*

ANNUITY:

1. A mortgage given to secure an annuity provided that in case the annuity was not promptly paid, the annuitant might sell the mortgaged land, and,

after paying the overdue instalments, might either re-invest the money or might estimate the cash value of her annuity at the day of sale, and retain the amount out of the proceeds. The annuity was in arrears, and a suit was brought by a second mortgagee to foreclose. The annuitant elected to take the cash value of her annuity, but died pending the action to foreclose; *Held*, that her administrator was only entitled to the unpaid arrears of the annuity and interest thereon. *Moore* v. *Dunn*, 63.

APPEAL:

1. Where, in deference to the opinion of the Judge, a plaintiff submits to a non-suit and appeals, the non-suit will be set aside and a new trial ordered, if in any view of the evidence the plaintiff has made out a *prima facie* case. *Abernathy* v. *Stowe*, 213.
2. If an appellant fails to perfect his appeal either by his own negligence or that of his agent, he loses his appeal. *Winborne* v. *Byrd*, 7.
3. When an action is tried at a term of a Superior Court, which term expires less than ten days before the next term of the Supreme Court begins, the appellate term of the latter court for such action is that which begins next after the expiration of the time allowed by law for perfecting the appeal. *Gregory* v. *Hobbs*, 39.
4. Where an appellant allowed the term of the Supreme Court to which his appeal should have been taken to pass without either causing his appeal to be docketed in the Supreme Court, or obtaining a *certiorari* in lieu of an appeal; *Held*, that he was not entitled to a *certiorari* at the next term of the Supreme Court. *Suiter* v. *Brittle*, 53.
5. Where no statement of the case accompanies the record, the judgment will be affirmed, unless upon looking into the record it is found that there is a want of jurisdiction, or it is apparent from the whole case that the plaintiff is entitled to no relief. *Green* v. *Dawson*, 61.
6. When a new trial is awarded by the Supreme Court on appeal, the case goes back to the Superior Court for a new trial on the whole merits, and the court below ought to proceed with the trial, as if no former trial had taken place. It is immaterial that the evidence is the same as that used on the former trial. *McMillan* v. *Baker*, 110.
7. In a petition for a *certiorari* to correct a mistake in a case stated on appeal by the Judge, it must be shown that by inadvertence, mistake or accidental misapprehension, the presiding Judge misstated or failed to state something that ought to appear in the case settled on appeal, and that the Judge would probably make the correction, if the *certiorari* is granted. *Ware* v. *Nisbet*, 202.
8. The absence of the Judge from the district does not dispense with the requirement that he should settle the case on appeal upon disagreement of counsel. *Owens* v. *Phelps*, 231.
9. When counsel disagree as to the statement of the case on appeal, and instead of submitting the two variant statements to the judge, they are both sent to the Supreme Court, that court will not dismiss the appeal, but will presume that the appellant agrees to the amendments contained in the case of the appellee, which will be taken as the case on appeal. *Ibid.*

10. An appeal not prosecuted for two terms of the Supreme Court will be dismissed when reached in regular order, unless good cause be shown for a continuance. *Brantly* v. *Jordan*, 291.

11. An appeal must be brought to the term of the Supreme Court that comes next after it was taken. *Collins* v. *Faribault*, 310; *Pittman* v. *Kimberly*, 562.

12. If an appeal is not brought to the proper term of the Supreme Court, on good cause shown, a *certiorari* will be granted. *Ibid.*

13. Providing an undertaking on appeal is not a professional duty which an attorney owes to his client, and an assumed agency of counsel to see that this is done, is the same as if the agent was not a professional man, and his neglect is the neglect of the principal, so far as losing the right to appeal is concerned. *Churchill* v. *Ins. Co.*, 485.

14. When the transcript does not show that any court was held, or that any Judge was present or gave judgment, it is so defective that the Supreme Court has no jurisdiction to act upon it. *Broadfoot* v. *McKethan*, 561.

15. If for any reason the Judge fails to settle the case on appeal, upon disagreement of counsel, in time for the appeal to be docketed in the Supreme Court, the appellant must bring up the record in its imperfect state and have it docketed, and then move for the proper orders to get the case on appeal before this court, otherwise the appeal will be dismissed. *Pittman* v. *Kimberly*, 562.

16. It is the duty of the appellant and not of the clerk to have the record sent to the Supreme Court. So where the case on appeal was filed in the office of the Clerk of the Superior Court a short time before the term of the Supreme Court to which it should have been brought expired, but the transcript was not docketed until during the next term, the appeal was dismissed, although the appellant had applied for a *certiorari* at the term at which his appeal should have been docketed. *Ibid.*

17. In order for the Supreme Court to acquire jurisdiction, it must appear in the transcript of the record, that an action was instituted, that proceedings were had and a judgment rendered from which an appeal could be taken, and that an appeal was taken from such judgment. *Spence* v. *Tapscott*, 576.

18. Where the transcript of the record sent to the Supreme Court is imperfect, the appeal will not be dismissed, but the papers will be remanded, in order that a proper transcript may be sent up. *Ibid.*

19. The constitutional provisions that the Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below upon any matter of law or legal inference, is not impaired by an act of the Legislature postponing the right of appeal until the final determination of the cause; and the general law allowing appeals from interlocutory judgments must yield to the provisions of a special act. *Railroad Co.* v. *Warren*, 630.

20. Until the term expires, there is no final determination of the cause, so that the case on appeal need only be filed within five days after the end of the term at which judgment is rendered. *Turrentine* v. *The Railroad*, 642.

21. In calculating the time within which the case on appeal must be filed, the first day is to be excluded. *Ibid.*

22. Where part of the issues in an action are decided by a trial, and others, material to the final disposition of the cause, are left open for further adjustment, an appeal is premature, and it will not be entertained. *University* v. *The Bank*, 651.

23. An appeal can be taken from an order of the Superior Court either making or refusing to make additional parties, when such order affects a substantial right of the appellant; and *it seems* that the appeal may either be taken at once, or it can be assigned as error on an appeal from the final judgment. *Merrill* v. *Merrill*, 657.

24. An appeal lies at once from an interlocutory order that may in effect put an end to the action, or that may prejudice a substantial right of the party complaining. *Ibid.*

APPEAL—ASSIGNMENT OF ERROR:

1. The assignment of error, that certain issues were not submitted, when such issues were not asked until after the trial, comes too late. *Simmons* v. *Mann*, 12.

2. Allowing an amendment to a petition for a *recordari*, is a matter of discretion, and cannot be assigned as error. *Pritchard* v. *Sanderson*, 41.

3. Where the alleged error is jurisdictional, it may be assigned for the first time in the Supreme Court. *Hunter* v. *Yarborough*, 68.

4. An order of the Superior Court, striking out an answer in an action of ejectment for want of a bond by the defendant, is reviewable where the defendant has been led to assume that the plaintiff has waived the bond. *McMillan* v. *Baker*, 110.

5. In an action on a judgment, it cannot be assigned as error for the first time in the Supreme Court, that the plaintiff did not obtain leave as required by sec. 14, C. C. P., to bring the action. *Dunlap* v. *Hendley*, 115.

6. The plaintiff claimed the *locus in quo* as devisee, and also alleged that the defendant had possession thereof as his tenant. The defendant objected to the introduction of the will under which plaintiff claimed. The jury having found that the defendant went into possession of the land as plaintiff's tenant; *It was held*, that any error in admitting the will in evidence was immaterial. *James* v. *Russell*, 194.

7. Refusal to submit an issue not raised by the pleadings cannot be assigned as error. *Bell* v. *Hoffman*, 273.

8. In references by consent, it is only when there is no evidence reasonably sufficient to warrant the referee's findings of fact, that a matter of law is presented, reviewable on appeal. *Hunter* v. *Kelly*, 285.

9. Where an order grants a continuance not merely for the term, and for some incidental reason, but is an adjudication which arrests the action for a length of time, it affects a substantial right, and can be appealed from. *Stratford* v. *Stratford*, 297.

10. The appointment of a receiver in supplemental proceedings does not rest solely in the discretion of the Judge, and his action in appointing or refusing to appoint may be assigned as error on appeal. *Coates* v. *Wilkes*, 376.

11. Where it appears in the record that the plaintiff took a non-suit and appealed before the issues arising on a counter-claim pleaded by the defendant had been disposed of, but no objection was made by the defendant at the time; *Held*, not to be such an exception as can be taken for the first time in this Court. *Harper* v. *Dail*, 394.

12. The granting or refusing a continuance is entirely discretionary with the presiding Judge, and cannot be assigned for error on appeal. *Dupree* v. *Insurance Co.*, 417.

13. The admission of immaterial evidence cannot be assigned as error. *Ibid.*

14. Refusal to allow further testimony after the case has been closed, is matter of discretion and not subject to review. *Ibid.*

15. Where the Supreme Court cannot pass upon the facts, it cannot be assigned as error that the referee has found against the weight of evidence *Barbee* v. *Green*, 471.

16. The Supreme Court can review on appeal what is mistake, surprise or excusable neglect under section 274 of *The Code*, but it cannot review the discretion exercised by a Judge of the Superior Court under that section. *Foley* v. *Blank*, 476.

17. A new trial granted by the Superior Court on the ground of excessive damages cannot be reviewed on appeal. *Goodson* v. *Mullin*, 211.

18. Where an appeal was taken both from the order, allowing a judgment to be entered *nunc pro tunc*, and also from the judgment itself; *It was held*, that the appeal from the judgment would not be considered. *McDowell* v. *McDowell*, 227.

19. Where the judge below, in the exercise of his discretion, refuses to open the biddings and order a re-sale on an advance of ten per cent., before the sale is confirmed, the Supreme Court will not review such order on appeal. *Trull* v. *Rice*, 572.

20. Assignment of error for the exclusion of proposed evidence must distinctly point out its relevancy and materiality. *Sumner* v. *Candler*, 634.

21. It is the duty of the party excepting to show the error excepted to, and to state such of the evidence as is necessary to enable this court to comprehend and decide the point. When the record does not contain *such* evidence, this court cannot review the decision of the Superior Court, but will affirm it. *Williams* v. *Whiting*, 683.

22. An omission to give an instruction, which might have been proper had it been asked, cannot be assigned as error. *Davis* v. *Council*, 725.

23. An instruction asked after the rendition of the verdict is not in apt time, and may be disregarded. *Ibid.*

24. The only assignments of error, which do not appear in the case on appeal, which the Supreme Court will consider, are want of jurisdiction, and that the complaint does not allege a cause of action. *Ibid.*

25. The rejection of evidence by the Court, which, if admitted, would have been prejudicial to the prisoner, cannot be assigned as error. *State* v. *Anderson*, 782.

26. A Judge is not required to give instructions in the very words in which they are asked, and when the charge to the jury substantially embraces the prayer for instructions, it is no ground for a new trial. *Ibid.*

27. It is not error to refuse a prayer for instructions which is not founded on any evidence in the case, and is purely hypothetical. *Ibid.*

28. When a witness was not sworn, and the fact was not discovered until after the jury had retired; *It was held*, not to entitle the accused to a new trial as a matter of law. The correction of such omissions is left to the discretion of the judge to set aside the verdict and grant a new trial. *State* v. *Gee*, 756.

29. **Exceptions to evidence, except to such as is made incompetent by statute** on grounds of public policy, if not made in apt time, are deemed to be waived, and cannot be afterwards assigned as error. *Ibid.*

30. The regular mode of trial of indictments is for the State to introduce evidence to sustain the charge; the accused then introduces evidence to make good his defence. Then the State has only the right to introduce rebutting evidence, and evidence strictly to strengthen and support that offered at first. After this, further introduction of evidence is matter of discretion with the Judge, and not reviewable, unless, perhaps, in case of a clear abuse of power. *State* v. *Lemon*, 790.

31. The defendant only has the right to ask for special instructions before the case is given to the jury, but if after the jury have retired, the Court should recall them and instruct them further, the defendant can except if the charge is incorrect. *State* v. *Barbee*, 820.

APPEAL—FROM JUSTICES OF THE PEACE:

1. Appeals cannot be taken from justices of the peace to the Superior Courts from interlocutory judgments; therefore, where a justice dismissed a warrant of attachment, and the plaintiff appealed to the Superior Court, which court dismissed the plaintiff's action on the ground that no service of process had ever been made; *Held*, erroneous, as no appeal lay from the order of the justice and the Superior Court should only have dismissed the appeal. *Phelps* v. *Worthington*, 270.

2. The jurisdiction of the Superior Court, in appeals from a justice of the peace, is entirely derivative, and if the justice had no jurisdiction in the action as it was before him, the Superior Court can derive none by amendment. So where a counter-claim, filed to an action brought before a justice, amounted to more than $200, the want of jurisdiction could not be cured by entering a *remittitur* for the excess in the Superior Court. *Ijames* v. *McClamroch*, 362.

APPEAL—UNDERTAKING ON:

1. Where the case on appeal, made out by the presiding Judge, uses the words "Bond fixed at $25, bond given," it was held a waiver of the statutory requirement that the surety to the undertaking on appeal must justify. *Gruber* v. *Railroad Co.*, 1.

2. Where the approval of an unjustified bond is the act of the clerk, there is no waiver, unless the appellee is present, or afterwards assents. *Ibid.*

3. It is not the duty of the appellant's counsel to file the appeal bond. *Winborne* v *Byrd*, 7.

4. The undertaking for costs, required on appeal, is to secure the costs of the appellee; therefore the surety is not liable for the appellant's costs, where the judgment is reversed. *Morris* v. *Morris*, 142.

5. Each party may be required by the clerk to pay his costs when they are incurred. When this is not done, the clerk must look only to the party incurring them, except when the appellee recovers costs, in which case the surety on the appeal bond is liable. *Ibid.*

6 Providing an undertaking on appeal is not a professional duty which an attorney owes to his client, and an assumed agency of counsel to see that this is done is the same as if the agent was not a professional man, and his neglect is the neglect of the principal, so far as losing the right to appeal is concerned. *Churchill* v. *Insurance Co.*, 485.

7. Where an appeal has been dismissed for want of a proper justification of the undertaking on appeal, neither haste, ignorance nor inadvertence in the appellant's counsel in preparing the undertaking on appeal, will furnish any ground for issuing a *certiorari* as a substitute for an appeal. *Turner* v. *Quinn*, 501.

8. Where the surety to an undertaking on appeal does not justify, but it appears that the surety was tendered and accepted, and the instrument duly executed in open court without objection; *Held*, to be a waiver of the statutory requirement. *Greenlee* v. *McCelvey*, 530.

9. The undertaking on appeal must be filed within ten days after the rendition of the judgment. *Boyden* v. *Williams*, 546.

10. Where an appeal bond has no date, it will be presumed to have been filed on the day that it is justified. *Ibid.*

APPROPRIATION:

1. When it was agreed between the vendor and vendee of land that the cotton raised on the land during each of the five years for which credit was given, should be forwarded to the plaintiff and sold and the proceeds applied to the payment of the purchase money, the cotton is, in advance, appropriated to the debt, and as soon as the money is received the debt is *pro tanto* satisfied, and can only be revived by the consent of the debtor. *Williams* v. *Whiting*, 683.

2. This consent may be express or result from implication, and, if the latter, must rest on clear and unequivocal evidence of intent. *Ibid.*

ARBITRATION:

In an action for the recovery of land, the defendant denied the allegations of the complaint and pleaded a counter-claim, alleging title to the lands in himself, and asking damages for trespasses done thereon by the plaintiffs. By consent, the case was submitted to arbitrators to decide the

matters in issue, *except the question of title*, the award to be a judgment of the Court. The arbitrators awarded damages to the defendant. Upon filing the award, the Court gave judgment against the plaintiffs for the amount found by the arbitrators; *Held*, to be erroneous, as the defendant could have no judgment for damages until the issue as to the title should be determined in his favor. *Whedbee* v. *Leggett*, 465.

ARREST OF JUDGMENT:

1. Where an affidavit for the removal of a case stated that the State could not get justice in either Mitchell or Yancey counties, and this was recited in the order, and the cause removed to Caldwell county; *Held*, to be no ground for an arrest of judgment. *State* v. *Anderson*, 732.
2. It is no ground to arrest the judgment, because, on such removal, two transcripts are sent to the county to which it is removed, although the first is defective, and the second is transmitted without a writ of *certiorari*. *Ibid.*

ASSAULT:

Where a person is obstructed in the exercise of a legal right, or prevented from doing what he proposed to do, and may lawfully do, by a display of physical force, as in brandishing a deadly weapon with violent threats of using it, and this in such proximity as admits of an effectual execution of the menace, in consequence of which such person desists, an assault is consummated. *State* v. *Horne*, 805.

ASSIGNEE:

1. Section 539 of The Code, fixing the assignee of the cause of action with costs, does not apply to an assignment of the cause of action as collateral security for a continuing obligation. *Davis* v. *Higgins*, 203.
2. Nor when the assignment is only of a *part* and not of the *whole* cause of action. *Ibid.*
3. It applies when the assignee might, under §188 of The Code, be substituted for the original plaintiff. *Ibid.*
4. The plaintiff having transferred the claim upon which this action was subsequently brought, to an attorney at law, for collection, and with directions to him to apply the proceeds to demands which he held for collection against the plaintiff due other parties; *Held*, the plaintiff cannot maintain an action in his name to recover the sum alleged to be due upon the claims. *Wynne* v. *Heck*, 414.

ATTACHMENT:

1. Where notice of an attachment and summons were published in one notice for five weeks, it was held a sufficient publication of the notice of attachment, but not of the summons. *Bank* v. *Blossom*, 695.
2. Where notice of the attachment is omitted from the order of publication, but in the published notice the defendant is informed that an attachment

has been issued against his property, to what court it is returnable, &c., the court has power to amend the order of publication, so as to insert a requirement that notice be given of the attachment. *Ibid.*

ATTORNEY:

1. A notice of a motion to set aside a judgment may be properly served on the attorney of record of the opposing party. *Branch* v. *Walker*, 87.
2. An attorney of record cannot withdraw from an action without leave of court, and his relation to the matter continues until the judgement is satisfied. *Ibid.*
3. It is settled in this State that demand must be made of an attorney or collecting agent, who has collected money for a client or principal, before an action will lie or the statute of limitations begin to run. But, when the reception of the money was unauthorized and wrongful, the plaintiff can waive the tort, and sue for money had and received to his use, without demand; and in this case the statute begins to run when the money is received, and bars the action in three years. *Bryant* v. *Peebles*, 176.
4. Where a claim is assigned to an attorney to collect and apply the proceeds to a claim he holds for collection against the assignor, he is a necessary party to an action on the claim. *Wynne* v. *Heck*, 414.
5. Providing an undertaking on appeal is not a professional duty which an attorney owes to his client, and an assumed agency of counsel to see that this is done is the same as if the agent was not a professional man, and his neglect is the neglect of the principal, so far as losing the right to appeal is concerned. *Churchill* v. *Ins. Co.*, 485.
6. Neither haste, ignorance nor inadvertence in the appellant's counsel in preparing the undertaking on appeal will furnish any ground for granting a *certiorari* as a substitute for an appeal. *Turner* v. *Quinn*, 501.
7. An attorney for a foreign corpopration, who has claims to collect for them in this State, is not a local agent upon whom process can be served. *Moore* v. *The Bank*, 590.

BOND:

A seal imports, or rather dispenses with proof of consideration, except when equitable relief is sought. *Buxly* v. *Buxton*, 479.

BOND TO STAY EXECUTION:

1. In an action on a bond given to stay execution on an appeal from a justice's judgment, it is not necessary to allege that the plaintiff had sustained damage on account of the appeal. *McMinn* v. *Patton*, 371.
2. Where the condition of the bond to stay such execution was, that if judgment be rendered against the appellant and execution thereon be returned unsatisfied in whole or in part, the sureties will pay the amount unsatisfied, together with all costs and damages; *Held*, sufficient under the statute. *Ibid.*
3. Before the Act of 1879, ch. 68, (*The Code*, §884), a civil action, and not a summary proceeding in the cause, was the proper remedy against the sureties to an undertaking to stay execution on an appeal from the judgment of a justice of the peace. *Ibid.*

BURDEN OF PROOF:

1. Where the plaintiff claims land under a deed purporting to convey it, and shows an apparently adverse possession, the burden of proof is on the defendant to show that such possession is not adverse; and, when he claims a reversionary estate after a life-estate, that such life-estate determined too short a time before bringing the action to bar his right. *Staton* v. *Mullis*, 623.

BURNING GIN-HOUSE:

The indictment in this case, set out in full in the opinion, sufficiently charges the crime of burning a gin-house, created by §985, sub-division 2, of *The Code*. *State* v. *Green*, 779.

CARRIER OF PASSENGERS:

1. Where the owners of a steamboat provided a pass-way which was exposed to escaping steam, and a passenger was injured in consequence by the escaping steam; *Held*, that the owners were liable. *Gruber* v. *R. R. Co.*, 1.
2. Where, by its charter, a corporation is empowered to cut and manufacture lumber and ship it to market, it can, in providing means of transportation for its own products, carry passengers and goods of others. *Ibid.*
3. Railroad companies are held to a high degree of responsibility in providing for the safety of passengers. But from the nature of their business, it is attended with some danger, and when they make it as safe as it practically can be made, they are not liable for an injury which results to a passenger from his own lack of caution. *Potter* v. *R. R. Co.*, 541.
4. Where a passenger—a child of nine years of age—fell and broke her arm over the iron rail of the track of a railroad company, which was close to the defendant's, at its depot where it was accustomed to receive and discharge passengers, no negligence being shown in the manner in which the rails were arranged, the defendant was not liable. *Ibid.*

CASE ON APPEAL:

1. Where no statement of the case accompanies the record, the judgment will be affirmed, unless upon looking into the record it is found that there is a want of jurisdiction, or it is apparent from the whole case that the plaintiff is entitled to no relief. *Green* v. *Dawson*, 61.
2. Where the case on appeal made out by the presiding judge uses the words "Bond fixed at twenty-five dollars, bond given," it was held to be a waiver of the statutory requirement that the surety must justify. *Gruber* v. *R. R. Co.*, 1.
3. The absence of the judge from the district does not dispense with the requirement that he should settle the case on appeal upon disagreement of counsel. *Owens* v. *Phelps*, 231.
4. When counsel disagree as to the statement of the case on appeal, and instead of submitting the two variant statements to the judge, they are both sent to the Supreme Court, that court will not dismiss the appeal,

but will presume that the appellant agrees to the amendments contained in the case of the appellee, which will be taken as the case on appeal. *Ib.*

5. Where a *certiorari* is granted, because no case on appeal has been prepared, the Supreme Court will limit the time within which the case may be prepared and served by the appellant, and in case the parties do not agree, it will be settled as directed by §550 of *The Code*. *Sparks* v. *Sparks*, 359.

6. If for any reason the judge fails to settle the case on appeal upon disagreement of counsel, in time for the appeal to be docketed in the Supreme Court, the appellant must bring up the record in its imperfect state and have it docketed, and then move for the proper orders to get the case on appeal before this court, otherwise the appeal will be dismissed. *Pittman* v. *Kimberly*, 562.

7. Until the term expires, there is no final determination of the cause, so that the case on appeal need only be filed within five days after the end of the term at which judgment is rendered. *Turrentine* v. *The Railroad*, 642.

8. In calculating the time within which the case on appeal must be filed, the first day is to be excluded. *Ibid.*

9. The only assignments of error, which do not appear in the case on appeal, which the Supreme Court will consider, are want of jurisdiction, and that the complaint does not allege a cause of action. *Davis* v. *Council*, 725.

CERTIORARI:

1. Where the appellant's counsel told him that he (the counsel) would do everything necessary towards perfecting his appeal, but the counsel failed to file a proper appeal bond; *Held*, no ground for a *certiorari*. *Winborne* v. *Byrd*, 7.

2. If an appellant fails to perfect his appeal, either by his own negligence, or that of his agent, he loses it absolutely. *Ibid.*

3. In this class of cases, the appellant is only entitled to the writ of *certiorari* as a substitute for an appeal, where he has lost his appeal by no act or neglect of his own, or of his agent, but by the error or neglect of the court or its officers, or by the contrivance of the appellee or his agent, or by their acts or declarations, reasonably calculated to mislead, or where by some insurmountable obstacle, he is prevented from perfecting his appeal. *Ibid.*

4. It is immaterial that it was the appellant's counsel who neglected to file a proper appeal bond, as it was not his duty as counsel to do so. *Ibid.*

5. Where an appellant allowed the term of the Supreme Court to which his appeal should have been taken to pass without either causing his appeal to be docketed in the Supreme Court, or obtaining a *certiorari* in lieu of an appeal; *Held*, that he was not entitled to a *certiorari* at the next term of the Supreme Court. *Suiter* v. *Brittle*, 53.

6. In a petition for a *certiorari* to correct a mistake in a case stated on appeal by the Judge, it must be shown that by inadvertence, mistake or accidental misapprehension, the presiding Judge misstated or failed to state something that ought to appear in the case settled on appeal, and that the Judge would probably make the correction, if the *certiorari* is granted. *Ware* v. *Nisbet*, 202.

7. If an appeal is not brought to the proper term of the Supreme Court, on good cause shown, a *certiorari* will be granted. *Collins* v. *Faribault*, 310.

8. A *certiorari*, in lieu of an appeal, will be granted, when it appears that the appellant has been guilty of no neglect or delay in prosecuting his appeal. *Sparks* v. *Sparks*, 359.

9. Where a *certiorari* is granted, because no case on appeal has been prepared, the Supreme Court will limit the time within which the case may be prepared and served by the appellant, and in case the parties do not agree, it will be settled as directed by §550 of *The Code*. *Ibid.*

10. An application for a *certiorari* as a substitute for an appeal will be denied, when the excuse for not perfecting the appeal is that the appellant left the filing of the appeal bond to his attorney, who neglected to do it. *Churchill* v. *Ins. Co.*, 485.

11. Where an appeal has been dismissed for want of proper justification of the undertaking on appeal, neither haste, ignorance nor inadvertence in the appellant's counsel in preparing the undertaking on appeal, will furnish any ground for issuing a *certiorari* as a substitute for an appeal. *Turner* v. *Quinn*, 501.

12 If the Judge fails to settle the case on appeal upon disagreement of counsel, in time for the appeal to be docketed in the Supreme Court, the appellant must bring up the record in its imperfect state and have it docketed and then move for the proper orders to get the case before the court, otherwise the appeal will be dismissed, although the appellant had applied for a *certiorari* at the term at which his appeal should have been docketed. *Pittman* v. *Kimberly*, 562.

13. It is no ground to arrest the judgment because, on removal, two transcripts are sent to the county to which it is removed, although the first is defective, and the second is transmitted without a writ of *certiorari*. *State* v. *Anderson*, 732.

14. Where the clerk sends a defective transcript, on the removal of a cause, it is not a compliance with the order, and he may, of his own motion, send another. *Ibid.*

CHARACTER:

1. It is incompetent to prove by a witness who does not know the general reputation of the accused, who was once a slave, what his former master said of him. *State* v. *Gee*, 756.

2. Where there is a direct conflict between the testimony of a witness and of the defendant, who offers himself as a witness, and evidence is introduced to show the good character of the witness, it is legitimate ground of comment by the solicitor, that no witness has been offered to show the good character of the defendant. *State* v. *Davis*, 764.

3. The *general* rule is that evidence of the general reputation of the deceased as a violent and dangerous man is not admissible; to this rule there is a well defined exception that such evidence is admissible, when there is evidence tending to show that the killing may have been done in self-defence, or when the evidence is wholly circumstantial and the character of the transaction is in doubt. *State* v. *McNeill*, 812.

CHARTER:

1. Where by its charter a corporation is empowered to cut and manufacture lumber and ship it to market, it can, in providing means of transportation for its own products, carry passengers and goods of others. *Gruber* v. *R. R. Co.*, 1.

2 It is no defence to an action of *tort* that the act complained of is *ultra vires*. Where a corporation undertook to carry passengers, one of whom was injured by the negligence of the corporation, it is immaterial to inquire, in an action for damages on account of such negligence, whether the corporation had the power under the charter to carry passengers or not. *Ibid.*

3. Where the State is a stockholder in a corporation, it is bound by the provisions of the charter in the same manner as an individual. By becoming a stockholder, it lays aside its sovereignty and places itself on the same footing as the individual stockholders. *Marshall* v. *The Railroad Co.*, 322.

4. A corporation, chartered for the purpose of promoting temperance, does not forfeit real estate which it has purchased, because it ceases to pursue the objects for which it was incorporated. *Asheville Div.* v. *Aston*, 578.

5. A corporation cannot endure longer than the time prescribed by its charter, and no judicial proceedings are necessary to declare a forfeiture for such a cause, but for any other cause of forfeiture, a direct proceeding must be instituted by the sovereign to enforce the forfeiture, and it cannot be taken advantage of in any collateral proceeding. *Ibid.*

CIVIL ACTION:

1. Before the Act of 1879, ch. 68, (*The Code*, §884), a civil action, and not a summary proceeding in the cause, was the proper remedy against the sureties to an undertaking to stay execution on an appeal from the judgment of a justice of the peace. *McMinn* v. *Patton*, 371.

2. Where it is sought to attack a consent judgment for fraud or mutual mistake, it must be done by a civil action, if it is a final judgment; if an interlocutory order, by a motion in the cause. *Vaughan* v. *Gooch*, 524.

3. When the statute prescribed no special manner for the collection of taxes, they may be collected by an action at law, but when a method is provided by statute, an action for their collection cannot be maintained. *Gatling* v. *Commissioners*, 586.

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COLOR OF TITLE:

1. An unregistered deed is color of title, and may be read in evidence without registration, upon due proof of its execution. *Hunter* v. *Kelly*, 285.
2. Where a party introduces a deed in evidence, which he intends to use as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession. *Smith* v. *Fite*, 319.
3. It is error to allow a jury on no evidence, or only on hypothetical evidence, to locate the land described in a deed. *Ibid.*
4. A deed conveying a life-estate is color of title, and when accompanied with adverse possession for the required time, will ripen into a good title to the life-estate so granted. *Staton* v. *Mullis*, 623.

5. Where A, having a life-estate, conveys to B in fee, who conveys to C, the reversioner or remainderman does not have a right of action until the death of the life tenant. At his death, the possession becomes adverse, and will ripen into a good title by seven years' possession, the title being out of the State. *Ibid.*

COMMISSIONS:

Under certain circumstances, a commission of 5 per cent. will be allowed. *Grant* v. *Edwards*, 442.

COMMON CARRIER:

Where by its charter, a corporation was empowered to cut and manufacture lumber and to ship the same to market, it can, in providing means of transportation for its own products, as incidental to its own business, carry the goods of others and passengers. *Gruber* v. *R. R. Co.*, 1.

COMPLAINT:

1. A judgment rendered without any complaint having been filed is not necessarily void. Such judgment is valid if rendered by consent, or if ratified by subsequent assent to it. *Stancill* v. *Gay*, 455.
2. Where a contract contains mutual dependent covenants, the plaintiff must allege that he has performed, or is ready to perform his part of the contract, before he can recover. *Wilson* v. *Lineberger*, 547; *Ducker* v. *Cochrane*, 597.
3. Where the complaint alleged that the plaintiff had a judgment against the estate of a decedent; that the assets of the estate were exhausted; that certain lands devised by the decedent were in the possession of his devisees, and that the personal representative had refused to apply for an order directing the sale of said land to make assets; *It was held*, that the complaint set out a cause of action. *Wilson* v. *Bynum*, 717.

CONFEDERATE MONEY:

1. The threat to employ force, or procure the arrest of the obligor in a bond unless he would receive Confederate money in payment, unaccompanied with an attempt to put the threat in force is not fraudulent. *Simmons* v. *Mann*, 12.
2. The act of receiving Confederate money by a guardian in 1863 in payment of a debt due to his ward is not fraudulent, or the evidence of fraud as to the ward. *Ibid.*
3. Where an executor sold property of his testator in July, 1863, on nine months' credit, he is liable for the scaled value of the money for which it sold, at the time of the sale and not at the expiration of the time of credit. *Depriest* v. *Patterson*, 399.
4. An executor during the war took certain notes belonging to the estate of his testator, and substituted for them Confederate money of his own. The notes proved to be worthless; *Held*, that he is chargeable with the scale value of the Confederate money at the date of the attempted substitution. *Depriest* v. *Patterson*, 402.

5. Where an executor swears that certain Confederate money was the property of the estate, but is unable to explain by whom it was paid, or how he is able to remember the character of the fund as being a part of the trust estate; *Held*, not sufficient to relieve him from liability. *Ibid.*

CONFESSIONS:

1. The declarations or confessions of a prisoner, either at the time when he is arrested or when he is charged with the crime, are admissible either for or against him when they are voluntarily made, and it is only necessary that the prisoner should be cautioned that he is at liberty to refuse to answer, and that such refusal will not prejudice him when the confession is made upon an examination before a magistrate. *State* v. *Howard*, 772.
2. Where it appeared that the officer making the arrest was accompanied by two other men, and that they were all large, strong men, but were not armed, and the prisoner was a small, weakly man, but that no threats or violence were used and no inducements held out; *Held*, that confessions could not be excluded on the ground that the defendant was put in fear by force and numbers. *Ibid.*

CONSENT JUDGMENT:

1. A judgment by consent cannot be set aside by one of the consenting parties when an execution issued thereon has been satisfied. *Moore* v. *Grant*, 316.
2. Where a consent judgment was entered which provided that a writ of possession for certain land was to issue, unless before a specified day referees appointed in the judgment shall ascertain the amount of purchase money due and allot to the defendant the land purchased by him, if the referees fail to act, the remedy is by a motion to modify the judgment by extending the time in which they may act, and not by a motion to set aside the judgment. *Ibid.*
3. An order or judgment entered by consent, cannot be set aside or modified, unless by consent, except for fraud or the mistake of both parties. *Vaughan* v. *Gooch*, 524.
4. Where such order or judgment is interlocutory, it may be corrected for such reasons, by a motion in the cause; but if it be a final judgment it must be done by a civil action. *Ibid.*
5. Where an interlocutory order, made by consent, directs the judicial sale of land, the parties to the action cannot change the terms of the order by consent, in a manner detrimental to the interest of a purchaser at such sale. *Ibid.*
6. A consent order directed a sale of certain lands by a commissioner, that said commissioner execute a deed to the purchaser, and further directed him how to apply the proceeds of the sale, but contained no provision for re-opening the biddings. After the sale, an advance of ten per cent. on the amount bid; *Held*, that the refusal by the Superior Court to open the biddings was proper. *Ibid.*

CONSIDERATION:

1. Where a father in view of the intended marriage of his daughter makes a deed to her and her intended husband for a tract of land, as an inducement to the marriage; *Held*, a valuable consideration. *Arnold* v. *Estis*, 162.
2. When a father, having several children, conveys a valuable tract of land to one for a nominal consideration, the presumption is that he intends it as an advancement and to be accounted for as such. *Harper* v. *Harper*, 300.
3. Either party may introduce evidence to support or rebut this presumption. *Ibid.*
4. Where it is agreed between the vendor and purchaser of a tract of land, that the purchaser shall have it surveyed at his expense, and if it shall be found to contain a smaller number of acres than is called for by the deed, that the vendor shall refund a *pro rata* part of the purchase money; *Held*, that the contract is founded on sufficient consideration. *Sherrill* v. *Hagan*, 345.
5. A seal imports, or rather dispenses with proof of consideration, except when equitable relief is sought. *Burly* v. *Buxton*, 479.
6. The execution of the bond sued on being denied by the defendant administrator, he introduced evidence of conflicting declarations made by the plaintiff to him when the bond was presented for payment, as to the sources from which she obtained the money, which was the consideration of the bond. Plaintiff failed to introduce evidence to corroborate either of these declarations, or to show from what source the money was procured by her; *Held*, that this furnished no presumption in favor of the defendant that his intestate had never executed the bond. *Ibid.*
7. The duty of maintainance which a husband owes to his wife is a sufficient consideration to support a voluntary deed made by him to her, and a court of equity will sustain such a consideration, although it is void at law. *Taylor* v. *Eatman*, 601.
8. A power simply collateral cannot be conferred upon one who is a stranger to the consideration, except by a deed which operates by transmutation of possession. *Ibid.*

CONSPIRACY:

1. While it is a general rule of evidence, that the acts and declarations of a person, in the absence of the prisoner, are not admissible in evidence against him, yet there are exceptions, one of which is in case of a conspiracy to do an unlawful act, when the acts and declarations of conspirators, in furtherance of the common purpose, are competent, although made in the absence of the others. *State* v. *Anderson*, 732.
2. The least degree of consent or collusion between parties to an illegal transaction, makes the act of one the act of the others. *Ibid.*
3. Where, in order to admit the acts and declarations of a third person as evidence against the prisoner, the State alleges that there was a conspiracy, the regular method of proceeding is for the State, in the first place, to establish the fact of a conspiracy by proof, but the judge, in his discre-

tion, may allow the acts and declarations to be given in evidence, the solicitor undertaking to prove the conspiracy at a later stage of the trial. *Ibid.*

4. The acts of the different parties alleged to be conspirators may be given in evidence to prove the conspiracy. *Ibid.*

5. The declaration of a conspirator, at the very time of the homicide, who was in close proximity to, but not within sight of, the prisoner, upon hearing a pistol shot, that the prisoner had killed some one, is admissible in evidence. *Ibid.*

6. Where it was alleged that there was a conspiracy between a person and the prisoner to take possession of a certain mine, in doing which the homicide took place, the declarations of such person, when setting out to take possession of the mine, as to his motives in doing so, are not competent evidence for the prisoner. *Ibid.*

CONTEMPT:

Where a party is ordered to pay money into court, or be attached for contempt in failing to do so, and swears that after every effort it is out of his power to pay it, the rule for contempt will be discharged; but where, on a return to the rule, he does not swear that he cannot borrow the money, and does show that he has some personal property, although exempt from seizure under final process for the payment of debts as personal property exemptions, the rule will not be discharged. *Smith* v. *Smith*, 304.

CONTINUANCE:

1. Where pending an action for divorce, the defendant becomes insane, the cause will be continued as long as there is a hope of the defendant's regaining reason. *Stratford* v. *Stratford*, 297.

2. In case of hopeless insanity, it is intimated that the plaintiff will be allowed to proceed with the trial. *Ibid.*

3. Where an order grants a continuance not merely for the term, and for some incidental reason, but is an adjudication which arrests the action for a length of time, it affects a substantial right, and can be appealed from. *Ibid.*

4. The granting or refusing a continuance is entirely a matter of discretion. *Dupree* v. *Insurance Co.*, 417.

CONTRACT:

1. There is no implied contract that the lessor will not molest the lessee, but there is an implied condition, upon a breach of which the lessee is discharged from his obligation to pay rent. *Barneycastle* v. *Walker*, 198.

2. An administrator has no power to rescind a contract to purchase land made by his intestate. *Owens* v. *Phelps*, 231.

3. In the absence of contrary finding, it is presumed that a contract is to be performed in the place where it is executed. *Hilliard* v. *Outlaw*, 266.

4. Whether a contract is usurious, depends upon the law of the place where it is to be performed. *Ibid.*

5. Where a contract is to be performed on a certain day, and on the day named therein, one of the parties tenders performance in the early part of the day, and the other party refuses to accept performance, the party so refusing cannot at a later hour in the day withdraw his refusal and hold the other party to the contract. *Bell* v. *Hoffman*, 273.

6. A parol contract to convey land is not void, but only voidable, if the vendor chooses to plead the statute of frauds. *Syme* v. *Smith*, 338.

7. Where it is agreed between the vendor and purchaser of a tract of land, that the purchaser shall have it surveyed at his expense, and if it shall be found to contain a smaller number of acres than is called for by the deed that the vendor shall refund a *pro rata* part of the purchase money; *Held*, that such contract is founded on a sufficient consideration, and that it is not within the provisions of the statute of frauds. *Sherrill* v. *Hagan*, 345.

8. In such case parol evidence is admissible to establish the contract. *Ibid.*

9. In order to correct a written contract, it must be alleged and proved, that there was either a mutual mistake in regard to a material fact, or that there was a mistake on the one part, and some fraudulent act on the other, whereby he was misled. *McMinn* v. *Patton*, 371.

10. When a receipt is evidence of a contract between the parties, it stands on the same footing as other contracts in writing, and cannot be contradicted or varied by parol; but when it is merely the acknowledgment of the payment of money or the delivery of goods, it may be contradicted by parol. *Harper* v. *Dail*, 394.

11. A party to a contract cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a non-performance thereof, or, if the stipulations are concurrent, his readiness and ability to perform them. *Ducker* v. *Cochrane*, 597. *Wilson* v. *Lineberger*, 547.

12. When it was agreed between the vendor and vendee of land that the cotton raised on the land during each of the five years for which credit was given, should be forwarded to the plaintiff and sold and the proceeds applied to the payment of the purchase money, the cotton is in advance appropriated to the debt, and as soon as the money is received, the debt is *pro tanto* satisfied, and can only be revived by the consent of the debtor *Williams* v. *Whiting*, 683.

13. This consent may be express or result from implication, and, if the latter, must rest on clear and unequivocal evidence of intent *Ibid.*

CONTRIBUTION:

1. The rule that parol evidence cannot be admitted to contradict a written contract, applies to actions on the contract itself, but not to such as arise collaterally out of it. So where it appeared on the face of a note that certain parties thereto were sureties, in an action for contribution, parol evidence is admissible to show that they were really principals. *Williams* v. *Glenn*, 253.

2. A claim for contribution cannot be set up by one defendant against another in a proceeding to sell land for assets. When the amount exceeds two hundred dollars, the court in term alone has jurisdiction of such cause of action, except in cases of contribution between persons claiming as devisees under a will, or as heirs-at-law of a testator to whom undevised land has descended, which exception is caused by section 1534 of *The Code*. *Wharton* v. *Wilkerson*, 407.

CONTRIBUTORY NEGLIGENCE:

1. In an action against a Railroad Company for an injury to the plaintiff, resulting from its negligence, although the plaintiff shows negligence on the part of the defendant, he cannot recover, if by reasonable care and attention on his part, he could have avoided the injury. *Turrentine* v. *The Railroad*, 688.

2. Mere negligence or want of ordinary care will not, however, bar the plaintiff's recovery, unless it is such that but for that negligence the misfortune would not have happened; nor if the defendant might by the exercise of care on his part, have avoided the consequence of the plaintiff's negligence. *Ibid.*

CORPORATION:

1. *It seems*, that where by its charter, a corporation was empowered to cut and manufacture lumber and to ship the same to market, it can, in providing means of transportation for its own products, as incidental to its own business, carry the goods of others and passengers. *Gruber* v. *R. R. Co.*, 1.

2. It is no defence to an action of tort, that the tort complained of resulted from an act which was *ultra vires*. So, where a corporation undertook to carry passengers, one of whom was injured by the negligence of the corporation, it was immaterial to inquire in an action for damages on account of such negligence, whether the corporation had the power under its charter to carry passengers, or not. *Ibid.*

3. A municipal corporation, which has the right under its charter to perform certain work, is not liable for any damages which may accrue to an individual from doing the work, provided it is done with ordinary skill and caution *Wright* v. *Wilmington*, 156.

4. A municipal corporation, in preparing side drains to its streets for carrying off rain water, is not required to provide against such extraordinary and excessive rains as could not be reasonably foreseen. So, when the plaintiffs sued for damages for flooding their cellar, caused by the gutters not being of sufficient capacity to carry off the water, and it appeared that they had for five years been sufficient, and only failed on this one occasion, it was error in the court below not to submit this view of the case to the jury. *Ibid.*

5. Where the State is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for by becoming such, it lays aside its character as sovereign, and places itself on a footing of equality with the individual stockholders. *Marshall* v. *R. R. Co.*, 322.

6. The property of a corporation belongs to it, and not to the stockholders. They only have an interest in such property through their relation to the company, and in this respect the State is like any other stockholder. So, where an Act of the General Assembly provided for a sale of the State's interest in a railroad company in which the State was a stockholder, *it was held* to be only a sale of the stock. *Ibid.*

7. Whether such sale would vest in the purchasers of the State's stock all the powers and privileges which the charter of the company had conferred on the State; *quære?* *Ibid.*

8. An act of the Legislature which provides that, in a certain contingency, the stockholders of an existing corporation shall re-organize as a new corporation, which changes the amount of the capital stock, and provides for the stockholders in the existing corporation by reserving a certain amount of the stock for them in the corporation to be formed, creates a new corporation, and is not an amendment to the charter of the one already in existence. In such case it is immaterial that the new corporationis called by the same name as the old one. *Ibid.*

9. *Quære*, whether the Legislature has power to compel the stockholders in the old corporation to re-organize as a new company; but if they do so voluntarily, the new corporation is regularly and legally formed. *Ibid.*

10. In such case, the organization of a new corporation at once dissolves the old one. *Ibid.*

11. If there are creditors of the dissolved corporation under these circumstances, they may cause the property of the defunct corporation to be applied to their debts by means of a receiver. *Ibid.*

12. A deed from an individual to a corporation will be good and pass the title to the land, if it clearly appears from the deed itself what corporation was intended, although a mistake or omission in the corporate name may have occurred, and this rule is not changed by the fact that at the time of executing the deed, the grantor was ignorant that the grantee was a body corporate, *Asheville Division* v. *Aston*, 578.

13. If lands are conveyed to a corporation aggregate, it will, from the nature of such corporations, be understood as a fee without any words of limitation. *Ibid.*

14. Although the existence of a corporation be limited to a certain number of years, yet it is capable of holding estates in fee. *Ibid.*

15. A corporation, chartered for the purpose of promoting temperance, does not forfeit real estate which it has purchased, because it ceases to pursue the objects for which it was incorporated *Ibid.*

16. A corporation cannot endure longer than the time prescribed by its charter, and no judicial proceedings are necessary to declare a forfeiture for such a cause, but for any other cause of forfeiture a direct proceeding must be instituted by the sovereign to enforce the forfeiture, and it cannot be taken advantage of in any collateral proceeding. *Ibid.*

17. A receiver, appointed under the act (The Code, sec. 670), to wind up the affairs of corporations, can proceed to collect in the assets, and to prosecute and defend suits, after the corporation has ceased to exist by the expiration of its charter. *Ibid.*

18. An attorney for a foreign corporation, who has claims to collect for them in this State, is not a local agent upon whom process can be served. *Moore* v. *The Bank*, 590.

19. A local agent of a foreign corporation, upon whom process can be served so as to bring the corporation into court, means an agent residing either permanently or temporarily in this State for the purpose of his agency, and does not include a mere transient agent. *Ibid.*

20. Where the prisoner was indicted for forging an order with intent to defraud a corporation, the corporate existence may be proved, although not alleged in the bill of indictment. *State* v. *Shaw*, 768.

CORRECTION OF A CONTRACT:

In order to correct a written contract, it must be alleged and proved, that there was either a mutual mistake in regard to a material fact, or that there was a mistake on the one part, and some fraudulent act on the other, whereby he was misled. *McMinn* v. *Patton*, 371.

COSTS:

1. The undertaking for costs, required on appeal, is to secure the costs of the appellee; therefore the surety is not liable for the appellant's costs, where the judgment is reversed. *Morris* v. *Morris*, 142.

2. Each party may be required by the clerk to pay his costs when they are incurred. When this is not done, the clerk must look only to the party incurring them, except when the appellee recovers costs, in which case the surety on the appeal bond is liable. *Ibid.*

3. On a trial before a justice, the defendant claimed a credit of $50 on the note sued on, which still left a balance due the plaintiff, and which the justice decided against him. On appeal to the Superior Court, this credit being the only matter in dispute, it was found by the jury in favor of the defendant; *Held*, that the defendant is liable for the costs in the Superior Court. *Kincaid* v. *Graham*, 154.

4. Section 539 of The Code does not apply to an assignment of the cause of action as collateral security for a continuing obligation. *Davis* v. *Higgins*, 203.

5. Nor when the assignment is only of a *part* and not of the *whole* cause of action. *Ibid.*

6. It applies when the assignee might, under §188 of The Code, be substituted for the original plaintiff. *Ibid.*

7. In an action of trespass to real property, where the plaintiff's title and the fact of trespass are both put in issue by the defendant's answer, and the jury find the issue as to the title in favor of plaintiff, and the issue as to the trespass in favor of defendant, the defendant is entitled to judgment for costs. To entitle the plaintiff to recover costs, both issues must be found in his favor. *Murray* v. *Spencer*, 264.

8. There were three indictments against a prisoner, to one of which he pleaded guilty, and judgment was suspended on the payment of costs. He was

found guilty on the other two, on one of which he was sentenced to imprisonment for ten days. After remaining in jail for the term of his imprisonment and twenty days additional, the prisoner took the oath prescribed for insolvent debtors and persons imprisoned for the costs and fine in a criminal prosecution, and applied for his discharge; *Held*, that he was entitled to his discharge in all three cases. *State* v. *McNeely*, 829.

COUNTER-CLAIM:

1. The jurisdiction of the Superior Court in appeals from a justice of the peace is entirely derivative, and if the justice had no jurisdiction in the action as it was before him, the Superior Court can derive none by amendment. So where a counter-claim, filed to an action brought before a justice, amounted to more than $200, the want of jurisdiction could not be cured by entering a *remittitur* for the excess in the Superior Court. *Ijames* v. *McClamroch*, 362.
2. Where it appears in the record that the plaintiff took a non-suit and appealed before the issues arising on a counter-claim pleaded by the defendant had been disposed of, but no objection was made by the defendant at the time; *Held*, not to be such an exception as can be taken for the first time in this Court. *Harper* v. *Dail*, 394.
3. When the defendant pleads as a counter-claim, a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's cause of action, the plaintiff cannot be permitted to take a non-suit. But when the counter-claim does not arise out of the same transaction as the plaintiff's cause of action, but falls under subdivision 2 of §244 of The Code, the plaintiff may submit to a non-suit. In such case, the defendant may either withdraw his counter-claim, when the action will be at an end, or he may proceed to try it, at his election. *Whedbee* v. *Leggett*, 469.
4. Where a mortgagee is indebted to a mortgagor, the mortgagor can use this indebtedness as a counter-claim against the debt secured by mortgage, and can maintain an action for the purpose of having the mortgage debt cancelled. *Harrison* v. *Bray*, 488.
5. A counter-claim is a defence to an action, and exists only in favor of a defendant. It arises when the demand, both of the plaintiff and the defendant, is a debt, arising out of contract and existing at the commencement of the action. *Gatling* v. *Commissioners*, 536.
6. Where a municipal corporation is indebted to a tax-payer, the latter is not entitled either in law or equity to have the amount due him applied as a set-off or counter-claim against the amount he owes for taxes. *Ibid.*

COUNTIES:

1. Where the plaintiff alleged that she paid to the sheriff $51.80 for her taxes, and afterwards, on the sheriff's removal from office, that she was forced to pay this sum a second time; *Held*, no cause of action was stated against the county. *Burbank* v. *The Commissioners*, 257.
2. Even if the tax collector unlawfully collected this money, it raised no liability on the part of the county. *Ibid.*

COVENANTS:

A party to a contract, cannot maintain an action for its breach without averring and proving a performance of his own antecedent obligations arising on the contract, or some legal excuse for a non-performance thereof, or, if the stipulations are concurrent, his readiness and ability to perform them. *Ducker* v. *Cochrane*, 597; *Wilson* v. *Lineberger*, 547.

CREDITOR'S BILL.

1. Where, in proceedings under a creditor's bill, a party's claim has been disputed, he must get a standing in court by establishing his own claim, before he can dispute that of another creditor. *Moore* v. *Edwards*, 43.
2. Where a creditor's claim is resisted in a creditor's bill, on the ground that the cause of action upon which the judgment was rendered was barred by the statute; *Held*, that the judgment having been rendered by a court of competent jurisdiction, it is not competent to go behind it. *Ibid.*

DAMAGES:

1. The Superior Courts may grant a new trial on the ground of excessive damages, but that is a matter exclusively within their discretion, and cannot be reviewed on appeal. *Goodson* v. *Mullen*, 211.
2. Where in an action for damage to land by ponding water on it, the jury found that the land was damaged eighty dollars per year, and His Honor gave judgment for a sum in gross, and not for each year's damages; *Held*, not to be erroneous. *Ibid.*
3. A person injured by a corporation, can recover damages, although the injury complained of, resulted from an act which was *ultra vires*. *Gruber* v. *R. R. Co.*, 1.
4. A court may refuse, for equitable reasons, to compel specific performance of a contract legally binding, and leave the party to his remedy in the recovery of damages for its violation. *Pendleton* v. *Dalton*, 185.
5. In proceedings under the statute for ponding water on plaintiff's land, the jury have no right to go back further than one year in assessing damages, but if they do, the error may be corrected by the Court only giving judgment for one year preceding the issuing of the summons. *Goodson* v. *Mullen*, 207.
6. Where, in such proceedings, the annual damages are assessed at less than $20 per annum, the judgment is for five years, including the year preceding the filing of the petition, for each year's damages so assessed, with a *cessat executio* for each year after the first year. *Ibid,*
7. Where the damages were assessed at as much as $20 a year, the judgment was the same, except that the plaintiff had his election to take judgment for five years, or only for the one year preceding the filing of the petition, in which case he was at liberty to bring his action at common law; but if the action was continued for more than five years, the judgment was for the entire amount, and the plaintiff was barred of his election. *Ibid.*
8. Where the jury find the damages are different for different years, they should assess them separately for each year. *Ibid.*

9. By §1860 of *The Code* the damages are to be assessed for five years, as they were prior to the Act of 1877, ch. 197. *Ibid.*

10. In an action on a bond given to stay execution on an appeal from a justice's judgment, it is not necessary to allege that the plaintiff had sustained damage on account of the appeal. *McMinn* v. *Patton*, 371.

11. Where a passenger—a child of nine years of age—fell and broke her arm over the iron rail of the track of a railroad company, which was close to the defendant's, at its depot where it was accustomed to receive and discharge passengers, no negligence being shown in the manner in which the rails were arranged, the defendant was not liable. *Potter* v. *R. R. Co.*, 541.

12. *Quære*, Whether the defendant could be held responsible for defects existing in the track of another railroad. *Ibid.*

13. Where the defendant, as overseer of a road, entered on and took possession of a piece of land belonging to the plaintiff for the purposes of the road, under a license from the tenant of the plaintiff; *Held*, that he was liable in damages in an action by the owner of the fee. *Dills* v. *Hampton*, 565.

DECLARATIONS:

1. When a deed is put in evidence simply as a declaration, it is subject to the same rules that apply to other declarations, one of the most important of which is that when a declaration is offered in evidence by one party, the opposite party has the right to all that was said at the time in the same connection. *McLurd* v. *Clark*, 312.

2. In an action brought by an administrator on notes given by some of the distributees for articles purchased at the administrator's sale, the declarations of the administrator, at the time when the notes were given, that he would only be obliged to collect a portion of the notes, as the estate owed only a small amount of debt, are inadmissible. *Ijames* v. *McClamroch*, 362.

3. The declarations of a party, made at the time that she handed a deed to her husband to deliver as her agent to the grantee, are admissible in evidence as a part of the *res gestæ*. *Harper* v. *Dail*, 394.

4. Declarations to become a part of the *res gestæ* must be made at the time of the act done, and must be consistent with the obvious character of the act. *Ibid.*

5. While it is a general rule of evidence, that the acts and declarations of a person, in the absence of the prisoner, are not admissible in evidence against him, yet there are exceptions, one of which is in case of a conspiracy to do an unlawful act, when the acts and declarations of conspirators, in furtherance of the common purpose, are competent, although made in the absence of the others. *State* v. *Anderson*, 732.

6. Where, in order to admit the acts and declarations of a third person as evidence against the prisoner, the State alleges that there was a conspiracy, the regular method of proceeding is for the State, in the first place, to establish the fact of a conspiracy by proof, but the Judge, in his discre-

tion, may allow the acts and declarations to be given in evidence, the solicitor undertaking to prove the conspiracy at a later stage of the trial. *Ibid.*

7. The declaration of a conspirator, at the very time of the homicide, who was in close proximity to, but not within sight of, the prisoner, upon hearing a pistol shot, that the prisoner had killed some one, is admissible in evidence. *Ibid.*

8. To constitute *res gestæ* there must be *an act* which may be explained by contemporaneous declarations. So where it was alleged that there was a conspiracy between a person and the prisoner to take possession of a certain mine, in doing which the homicide took place, the declarations of such person, before setting out to take possession of the mine, as to his motives in doing so, are not competent evidence for the prisoner. *Ibid.*

9. On a trial of an indictment the acts and declarations of another party tending to show that he committed the offence are inadmissible. *State* v. *Gee*, 756.

10. The declarations or confessions of a prisoner, either at the time when he is arrested or when he is charged with the crime, are admissible either for or against him when they are voluntarily made, and it is only necessary that the prisoner should be cautioned that he is at liberty to refuse to answer, and that such refusal will not prejudice him when the confession is made upon an examination before a magistrate. *State* v. *Howard*, 772.

11. Where a witness has been impeached, in order to corroborate him, he may be allowed to testify to statements made by him about the same matter shortly after it occurred, corroborating his evidence given on the trial. *State* v. *Whitfield*, 831.

DEED:

1. A description of land in a deed in these words, "All my interest in a piece of land adjoining the lands of J. J. J., J. K., and others, is too vague to admit of extrinsic evidence, and is void for want of certainty. *Harrell* v. Butler, 20.

2. Where a conveyance contains specifications or localities by which the land may be located, the number of acres constitutes no part of the description; but in doubtful cases this may have weight as a circumstance, and in some cases, in the absence of other definite description, it may have a controlling effect. *Ibid.*

3. A seal to a deed, although not on the line with the signature of the vendor, if it purports to be his seal and is referred to as such, is valid and will be held to be the seal of the vendor. *Ibid.*

4. A deed is evidence of its existence against all persons, while its recitals are evidence only against parties and privies. *Grandy* v. *Abbott*, 33.

5. The provisions in the Acts of 1868-'69, ch. 64, requiring the certificate of probate by the Probate Judge of a county, other than the county of registration, to be passed on by the Probate Judge of the latter county, is directory only. *Young* v. *Jackson*, 144.

6. The name of a place may serve to identify it, as well as adjoining lands or water courses. *Scull* v. *Pruden*, 168.

7. Where the subject-matter of a conveyance is completely identified by its name, by its localities and by other certain marks of description, the addition of another particular which does not apply to it, will be rejected as surplusage. *Ibid.*

8. Natural objects and boundaries will govern quantity in a deed. So, if A grants one thousand acres, and describes it by boundaries, all the land within the boundaries will pass, although it contain two thousand acres. *Ibid.*

9. In questions of boundary, what are the boundaries, is a question of law; where they are, is question of fact. *Ibid.*

10. An unregistered deed is color of title, and may be read in evidence without registration, upon due proof of its execution. *Hunter* v. *Kelly*, 285.

11. When a deed is put in evidence simply as a declaration, it is subject to the same rules that apply to other declarations, one of the most important of which is that when a declaration is offered in evidence by one party, the opposite party has the right to all that was said at the time in the same connection. *McLurd* v. *Clark*, 312.

12. Where a party introduces a deed in evidence, which he intends to use as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession. *Smith* v. *Fite*, 319.

13. It is error to allow a jury on no evidence, or only on hypothetical evidence, to locate the land described in a deed. *Ibid.*

14. Where the grantor in a deed is dead, and the subscribing witness has been a non-resident of the State and not heard from for a number of years, and it is impossible to prove his hand-writing, the deed may be proved and registered upon evidence that the signature of the grantor is genuine, without proving the hand-writing of the subscribing witness. *Howell* v. *Ray*, 510.

15. Where in such cases, the evidence upon which the Probate Judge acted in ordering the registration is set out in full, and it appears that such evidence was insufficient, the registration is void. *Ibid.*

16. The assent of infants will be presumed to a deed made to them as a gratuity at the instance of their mother for a valuable consideration moving from her, and, in order to avoid it, the infants must repudiate it after arriving at full age. *Gaylord* v. *Respass*, 553.

17. A deed is evidence of its own existence, and of whatever results from its existence, against all persons; its recitals are evidence only against parties and privies. *Ibid.*

18. A deed from an individual to a corporation will be good and pass the title to the land, if it clearly appears from the deed itself what corporation was intended, although a mistake or omission in the corporate name may have occurred, and this rule is not changed by the fact that at the time of executing the deed, the grantor was ignorant that the grantee was a body corporate. *Asheville Div.* v. *Aston*, 578.

19. If lands are conveyed to a corporation aggregate, it will, from the nature of such corporations, be understood as a fee without any words of limitation. *Ibid.*

20. Although the existence of a corporation be limited to a certain number of years, yet it is capable of holding estates in fee. *Ibid.*

21. The duty of maintenance which a husband owes to his wife is a sufficient consideration for a voluntary deed of land made by him to her, and a court of equity will sustain such a conveyance, although it is void at law. *Taylor* v. *Eatman*, 601.

22. To make a deed fraudulent as to subsequent purchasers, such purchaser must have paid *full value* for the land, and must also have puchased without notice of the prior voluntary conveyance. *Ibid.*

23. The registration of the prior voluntary deed is notice to the subsequent purchaser. *Ibid.*

24. Although it is generally necessary in deeds or wills, which are intended to execute powers of appointment, to refer to and recite the power, yet this is not necessary when the act itself shows that the donee had in view the subject of the power at the time, or when such deed or will would be a nullity, unless allowed to operate as the execution of the power. *Ibid.*

25. A power simply collateral cannot be conferred upon one who is a stranger to the consideration, except by a deed which operates by transmutation of possession. *Ibid.*

26. When the habendum and warranty clause of a deed are joined, and the intention to convey a fee is clear, the words of inheritance will be so transposed as to connect them with the conveying terms, so as to secure the intended effect of the deed. *Staton* v. *Mullis*, 623.

27. A deed conveying a life-estate is color of title, and when accompanied by adverse possession for the required time, will ripen into a good title to the life-estate so granted. *Ibid.*

28. A deed is an estoppel, even as between the parties thereto, only as to the estate conveyed. *Ibid.*

DEMAND:

It is settled in this State that demand must be made of an attorney or collecting agent, who has collected money for a client or principal, before an action will lie or the statute of limitations begin to run. But, when the reception of the money was unauthorized and wrongful, the plaintiff can waive the tort, and sue for money had and received to his use, without demand. *Bryant* v. *Peebles*, 176.

DEMURRER:

1. A demurrer which only states "that the Court has no jurisdiction of the action," is fatally defective. *Hunter* v. *Yarborough*, 68.

2. If the Court has no jurisdiction of the action, the objection can be taken at any time. *Ibid.*

3. A demurrer "1st, that the complaint does not set forth a cause of action against the defendant, 2nd, that the Court has no jurisdiction of the matter as set forth," will be disregarded as a pleading, but a motion to dismiss for these grounds will be sustained. *Burbank* v. *Commissioners*, 257.

4. Where the plaintiff alleged that she paid to the sheriff $51.80 for her taxes, and afterwards, on the sheriff's removal from office, that she was forced to pay this sum a second time; *Held*, no cause of action was stated against the county. *Ibid.*

DESCENT:

1. Where a reversion or remainder, expectant upon a freehold estate, comes by descent, and the reversioner or remainderman dies during the continuance of the particular estate, a person claiming the estate by inheritance must make himself heir to the original donor who erected the particular estate. *King* v. *Scoggin*, 99.

2. Where the reversion or remainder comes by descent and is conveyed by deed or devise to a stranger, before the determination of the particular estate, the donee takes by purchase, and the estate will descend to his heirs. *Ibid.*

3. Where the remainder or reversion is acquired by purchase, one claiming the estate by descent must make himself heir to the first purchaser of the remainder or reversion at the time when it comes into possession. *Ibid.*

DESCRIPTION OF LAND IN A DEED:

1. A description in a deed, in these words, "All my interest in a piece of land adjoining the lands of J. J. Jordan, Jos. Keen and others," is too vague to admit of extrinsic evidence to fit the description to the thing. *Harrell* v. *Butler*, 20.

2. Where conveyances contain specifications or localities by which the land may be located, the number of acres constitutes no part of the description; but in doubtful cases this may have weight as a circumstance, and in some cases, in the absence of other definite description, may have a controlling effect. *Ibid.*

3. The name of a place may serve to identify it, as well as adjoining lands or water courses. *Scull* v. *Pruden*, 168.

4. Where the subject-matter of a conveyance is completely identified by its name, by its localities and by other certain marks of description, the addition of another particular which does not apply to it, will be rejected as surplusage. *Ibid.*

5. Natural objects and boundaries will govern quantity in a deed. So, if A grants one thousand acres, and describes it by boundaries, all the land within the boundaries will pass, although it contain two thousand acres. *Ibid.*

6. In questions of boundary, what are the boundaries, is a question of law; where they are, is question of fact. *Ibid.*

7. Where a party introduces a deed in evidence, which he intends to use as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession. *Smith* v. *Fite*, 319.

8. It is error to allow a jury on no evidence, or only on hypothetical evidence, to locate the land described in a deed. *Ibid.*

DEVASTAVIT:

1. Where an executor attempts to pay his individual debts out of the assets of his testator he commits a *devastavit*, and his creditor who knowingly accepts such payment is liable to account to the estate therefor, but, in such account, he is entitled to credit for the amount of the executor's interest in the estate. *Grant* v. *Edwards*, 442.

2. An executor is only required to act in good faith and with reasonable care in the management of the estate. *Syme* v. *Badger*, 706.

3. Where an executor did not collect a debt, under the impression that it belonged to him personally, he will only be held accountable to the estate for the part of such debt as he actually collects. *Ibid.*

4. Where an executor takes a security in his own name for a debt due the estate, it is not, in the absence of fraud and improper purpose, a *devastavit*. *Ibid.*

5. *Quære*—Whether an administrator can be sued on his bond when he has been negligent in not obtaining an order to sell his intestate's land for assets. *Wilson* v. *Bynum*, 717.

DIVORCE:

1. In applications for alimony, under The Code, §1291, it is competent for the husband to controvert the allegations of the complaint by affidavit or answer, and the judge must find the facts, and set them forth in the record. *Lassiter* v. *Lassiter*, 129.

2. Where the facts as found by the Judge would, if found by the jury on the final hearing, warrant a divorce from bed and board, they *per se* constitute sufficient ground to award alimony *pendente lite*. *Ibid.*

3. Condonation is forgiveness upon condition, and the condition is, that the party forgiven will abstain from like offences afterwards. If the condition is violated, the original offence is revived. *Ibid.*

4. Much less cruelty or indignity is sufficient to revive transactions occurring before condonation, than to support an original suit for divorce. *Ibid.*

5. In an application for alimony it need not be found as a fact that the plaintiff was a faithful, dutiful and obedient wife. *Ibid.*

6. Where, pending an action for divorce, the defendant becomes insane, the cause will be continued as long as there is a hope of the defendant's regaining reason. *Stratford* v. *Stratford*, 297.

7. In case of hopeless insanity, it is intimated that the plaintiff will be allowed to proceed with the trial. *Ibid.*

DOWER:

1. Where land is mortgaged by a husband, which, after his death is assigned to his widow as dower, she has an equity to have the mortgage paid out of the personal assets. *Moore* v. *Dunn*, 63.
2. Where there is a devise in fee simple, with an executory devise over, the wife's right to dower attaches on the first estate, and is not defeated on its determination. *Pollard* v. *Slaughter*, 72.
3. A widow is entitled to dower in all lands of which her husband was seized during coverture, and which any child she might bear him could by possibility take by descent. *Ibid.*
4. The equitable jurisdiction of the Superior Courts over dower, has not been taken away by giving cognizance of such matters to the clerk; but in order for the jurisdiction to attach as a general rule, some equitable element should appear in the application. *Ibid.*
5. By section 1909 of *The Code*, in a sale for partition of land subject to dower, where the widow is a party, her life-estate may be valued in money, and the money paid to her in lieu of the interest for life on one-third of the proceeds of sale. *Winstead, ex-parte*, 703.

DRUNKENNESS:

1. Where a warrant charged the the two defendants with the violation of a town ordinance by being drunk in a public place in the town; *Held*, that the warrant was fatally defective for joining two defendants charged with an offence which could not be jointly committed. *State* v. *Deaton*, 788.
2. Where the defendant was indicted for shooting at a train, with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the Court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted. *State* v. *Barbee*, 820.

DURESS:

Where in 1863 a debtor, by means of threats of imprisonment, induced his creditor to receive Confederate money in payment of his debt, may be evidence of duress, but it is none of fraud. *Simmons* v. *Mann*, 12.

EJECTMENT:

1. Where in an action to recover land, the defendant failed to file a bond to secure costs and damages as required by *The Code*, sec. 237, it is error to strike out the answer on a motion made at the trial term, without giving the defendant an opportunity to file a bond at that time. *McMillan* v. *Baker*, 110.
2. The bond under this section of *The Code* is for the benefit of the plaintiff, and he can waive it, and will be deemed to have done so, if he allows a number of terms of court to pass without demanding it. If not waived entirely, it is waived until demanded. *Ibid.*
3. A tenant cannot contest his landlord's title until he has given up the possession of the land. *James* v. *Russell*, 194.

4. The second-story in a house, when separately held, may be recovered in an action of ejectment. *Asheville Division* v. *Aston*, 578.

5. The owner of an equitable estate may bring an action in the nature of ejectment under the Code system of procedure. *Taylor* v. *Eatman*, 601.

ELECTION:

1. Where an executor proves a will, he cannot elect to take against the will. So where a testator was indebted to the person he appoints his executor and leaves certain property to the executor in payment of the debt, which proved to be less in value than the amount of the debt, the executor, after proving the will, cannot elect to assert his rights as a creditor and retain his debt out of the other assets of the estate. *Syme* v. *Badger*, 706.

2. It is immaterial that the executor acted under a mistaken idea of the legal consequences of proving the will. *Ibid.*

ENTRY:

1. If the true owner enters on land, the possession at once follows the title, and both title and possession are then in him. A possession thus acquired by the true owner, although he enters under a mistaken and erroneous claim, nevertheless, is supplied by the legal estate, and the owner, in law, holds by his real, and not by his pretended title. *Logan* v. *Fitzgerald*, 644.

2. When the true owner enters, as an assertion of his right, it is not necessary to expel the occupant in possession at the time of such entry. *Ibid.*

3. Where the defendant was in actual possession of a part of the *locus in quo*, and had constructive possession of the rest, and the true owner, the plaintiff, enters upon the part of which the possession was constructive; *Held*, that such entry at once vests the possession in him, and seven years must elapse from such entry, before the defendant can acquire title by lapse of time. *Ibid.*

EQUITY OF REDEMPTION:

A sale to a mortgagee by himself, under a power of sale in the mortgage deed, is ineffectual to divest the equity of redemption from the mortgagor, and the relation of the parties is not changed by that act. *Howell* v. *Pool*, 450.

ESTOPPEL:

1. Where a bill in equity, filed under the former system of procedure by the vendee, to enforce the specific performance of a contract to convey land, and also praying for general relief, was dismissed, it was held that such dismissal was not an estoppel to an action brought under The Code to recover a sum of money alleged to have been paid in pursuance of said contract as a part of the purchase money for the land. *Pendleton* v. *Dalton*, 185.

2. Where a defendant has successfully resisted the specific performance of a contract, he will not be allowed to set up such contract as binding in order to defeat an action brought to recover money paid in pursuance of said avoided contract. *Ibid.*

3. A tenant cannot contest his landlord's title until he has given up the possession of the land. *James* v. *Russell*, 194.

4. Where one stands silently by and hears a contract made for him by another, he is bound by such contract. *Ibid.*

5. Where land subject to a judgment lien is mortgaged, and after the execution of the mortgage is sold under such judgment, the mortgagor who purchased from the purchaser at such execution sale, will not be estopped from setting up this title against a purchaser at a sale under the mortgage. *Weil* v. *Uzzell*, 515.

6. A party by taking a deed from one claimant does not debar himself from setting up a better title derived from some other source. *Gaylord* v. *Respass*, 553.

7. One who enters as a licenser, is estopped to deny the title of his licensee, and when the license is given by a tenant, the licenser is estopped to deny the title of the licensee's landlord. *Dills* v. *Hampton*, 565.

8. A deed is an estoppel, even as between the parties thereto, only as to the estate conveyed. *Staton* v. *Mullis*, 623.

EVIDENCE:

1. The contents of a letter written to the plaintiff by his agent and borne by the defendant, but of which he was ignorant, are not competent evidence on the trial though they may be material to the issue. *Simmons* v. *Mann*, 12.

2. The act of receiving Confederate money by a guardian on a debt due to his wards, in 1863, is not evidence of fraud on his part. *Ibid.*

3. Inducing a guardian, by threats of imprisonment to receive, in 1863, Confederate money in payment of a debt due to his wards may be evidence of duress, but is none of fraud. *Ibid.*

4. A description of land in a deed in these words: "All my interest in a piece of land adjoining the lands of J. J. Jordan and Joseph Keen and others," is too vague to admit of extrinsic evidence to "fit the description to the thing," and is void for want of certainty. *Harrell* v. *Butler*, 20.

5. Where the conveyance contains specifications or localities by which the land may be located, the number of acres constitutes no part of the description; but in doubtful cases may have weight as a circumstance, and in some cases, in the absence of other definite description, may have controlling effect. *Ibid.*

6. A deed is evidence of its *existence* against all persons, while its recitals are evidence only against parties and privies. *Grandy* v. *Abbott*, 33.

7. An entry on the docket of the Superior Court showing that a transcript of a justice's judgment has been filed, is *prima facie* evidence that the judgment has been rendered by the justice. The fact of docketing is *prima facie* evidence of its existence. *Moore* v. *Edwards*, 43.

8. Where the only evidence to show an agency was that some money belonging to the alleged principal had been paid to the party sought to be proved an agent, and the alleged agent had done sundry acts of kindness for the alleged principal; *Held*, no evidence to create an agency. *Fortescue* v. *Makeley*, 56.

9. Evidence which only gives rise to conjecture is calculated to bewilder and mislead a jury, rather than to lead them to a just conclusion. *Ibid.*

10. Facts to be given in evidence to prove any particular matter, should, in their bearing upon each other, tend to prove the matter to be established, and should point to it with such degree of certainty as will prove it to the satisfaction of a reasonable mind. *Ibid.*

11. It is error for the Court to leave a material fact to the jury upon which there is no evidence. *Ibid.*

12. Where a bond, executed by two obligors, is presumed to be paid by the lapse of time, the declarations of one of the obligors is not competent to rebut the presumption as to the other. *Rogers* v. *Clements*, 81.

13. In order to rebut the presumption of payment, it must be proved that the bond has not been paid by any of the debtors. The separate acknowledgment of one debtor is not even sufficient to charge him. *Ibid.*

14. In an action to rescind a contract for fraud, which fraud consisted in representing a bond, dated prior to August 1, 1868, to be unpaid, the obligor in such bond is a competent witness to prove that it has been paid. The *proviso* in section 580 of *The Code*, making any person incompetent to testify, who, at any time, has had an interest in such bond, only applies to actions *founded* on the bond. *Borden* v. *Gully*, 127.

15. The minute in writing of the evidence of a witness examined before a referee, is not admissible in evidence on the trial of an issue before a jury in the same cause. *Mott* v. *Ramsay*, 152.

16. Papers purporting to be exemplifications from the Treasury Department of the United States, but which were not authenticated in any manner whatever, cannot be admitted in evidence. *Ibid.*

17. Even if such papers had been admitted as evidence before the referee, this does not make them evidence in a trial before a jury, unless by consent. *Ibid.*

18. The rule that parol evidence cannot be admitted to contradict a written contract, applies to actions on the contract itself, but not to such as arise collaterally out of it. So, where it appeared on the face of a note that certain parties thereto were sureties, in an action for contribution parol evidence is admissible to show that they were really principals. *Williams* v. *Glenn*, 253.

19. The statute law of another State is a fact to be shown by evidence, and cannot be noticed judicially. *Hilliard* v. *Outlaw*, 266.

20. In references by consent, it is only when there is no evidence reasonably sufficient to warrant the referee's findings of fact, that a matter of law is presented, reviewable on appeal. *Hunter* v. *Kelly*, 285.

21. An unregistered deed is color of title, and may be read in evidence without registration, upon due proof of its execution. *Ibid.*

22. Where a will, proved in another State, bears the certificate of the clerk of the Court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication; *Held*, inadmissible in evidence. *Ibid.*

23. When a father, having several children, conveys a valuable tract of land to one for a nominal consideration, the presumption is, that he intends it as an advancement and to be accounted for as such. *Harper* v. *Harper*, 300.

24. Either party may introduce evidence to support or rebut this presumption. *Ibid.*

25. When a deed is put in evidence simply as a declaration, it is subject to the same rules that apply to other declarations, one of the most important of which is that when a declaration is offered in evidence by one party, the opposite party has the right to all that was said at the time in the same connection. *McLurd* v. *Clark*, 312.

26. Where a party introduces a deed in evidence, which he intends to use as color of title, he must prove that its boundaries cover the land in dispute, to give legal efficacy to his possession. *Smith* v. *Fite*, 319.

27. It is error to allow a jury on no evidence, or only on hypothetical evidence, to locate the land described in a deed. *Ibid.*

28 Where it is agreed between the vendor and purchaser of a tract of land, that the purchaser shall have it surveyed at his expense, and if it shall be found to contain a smaller number of acres than is called for by the deed that the vendor shall refund a *pro rata* part of the purchase money; *Held*, that parol evidence is admissible to establish the contract. *Sherrill* v. *Hagan*, 345

29. In an action brought by an administrator on notes given by some of the distributees for articles bought at the administrator's sale, the declarations of the administrator, at the time when the notes were given, that he would only be obliged to collect a portion of the notes, as the estate owed a small amount, are not admissible. *Ijames* v. *McClamroch*, 362.

30. In supplemental proceedings the evidence should all be taken down in writing. *Coates* v. *Wilkes*, 376

31. Where the judgment-debtor is examined, the creditor does not make him his witness, but may cross-examine and contradict him. The provision in The Code, allowing the examination of parties to actions, takes the place of the bill for discovery in the former system of procedure. *Ibid.*

32. Where the examination of the debtor shows that his books of account contain evidence material to the investigation he should be required to produce them. *Ibid.*

33. When a receipt is evidence of a contract between the parties, it stands on the same footing as other contracts in writing, and cannot be contradicted or varied by parol; but when it is merely the acknowledgment of the payment of money or the delivery of goods, it may be contradicted by parol. *Harper* v. *Dail*, 394.

34. The declarations of a party, made at the time that she handed a deed to her husband to deliver as her agent to the grantee, are admissible in evidence as a part of the *res gestæ*. *Ibid.*

35. Declarations to become a part of the *res gestæ* must be made at the time of the act done, and must be consistent with the obvious character of the act. *Ibid.*

36. Where an executor swears that certain Confederate money was the property of the estate, but is unable to explain by whom it was paid, or how he is able to remember the character of the fund as being a part of the trust estate; *Held*, not sufficient to relieve him from liability. *Depriest* v. *Patterson*, 402.

37. Where concurrent insurance is effected in different companies, all represented by the same general agent, an examination and valuation made by a subordinate agent of one of the insurers, is admissible in evidence against all who act on his report, and the same rule applies to successive insurance in different companies. *Dupree* v. *Ins. Co.*, 417.

38. The Court may permit a paper to be read in evidence before its execution has been proved, when the party introducing it undertakes, at a subsequent time, to prove the execution. *Ibid.*

39. It is incompetent to prove what a witness swore on a former trial, when the witness can, himself, be put on the stand. *Ibid.*

40. Where a witness has been questioned in regard to certain matters in his examination in chief, it is discretionary with the Judge whether he will allow further questions to be asked the witness in regard thereto, after the cross-examination has been completed. *Ibid.*

41. Refusal to allow further testimony after the case has been closed, is matter of discretion and not subject to review. *Ibid.*

42. In motions to set aside judgments for irregularity, and other motions of kindred nature, the rules of evidence are not so strictly adhered to as in the trial of an issue by a jury. In such cases the Court can hear any evidence which is reasonably calculated to aid it in arriving at a just conclusion. *Stancill* v. *Gay*, 455.

43. The execution of the bond sued on being denied by the defendant administrator, he introduced evidence of conflicting declarations made by the plaintiff to him when the bond was presented for payment, as to the sources from which she obtained the money which was the consideration of the bond. Plaintiff failed to introduce evidence to corroborate either of these declarations, or to show from what source the money was procured by her; *Held*, that this furnished no presumption in favor of the defendant that his intestate had never executed the bond. It was only a circumstance to be considered by the jury with the other evidence in the case. *Buxly* v. *Buxton*, 479.

44. It is not a violation of the Act of 1796, (*The Code, sec.* 413), for the Judge to tell the jury that the evidence, that the intestate had seen the bond and admitted that she had executed it, if believed by the jury to be true, is entitled to more weight than the opinions of experts as to the genuineness of the signature, and that such opinions should be received with caution. *Ibid.*

45. Where the grantor in a deed is dead, and the subscribing witness has been a non-resident of the State, and not heard from for many years, evidence of the grantor's hand-writing is admissible, without proving the hand-writing of the witness. *Howell* v. *Ray*, 510.

46. Evidence is relevant when it tends to the advantage of either litigant, and bears upon the issue. *Gaylord* v. *Respass*, 553.

47. A deed is evidence of its own existence, and of whatever results from its existence, against all persons; its recitals are evidence only against parties and privies. *Ibid.*

48. When the plaintiff claims under a deed purporting to convey the land in dispute, and shows an apparently adverse possession, the burden of proof is on the defendant to show that such possession is not adverse; and when he claims a reversionary estate after a life-estate, that such life-estate determined too short a time before the bringing of the action to bar his right. *Staton* v. *Mullis*, 623.

49. When the beginning corner was located, and there was evidence showing marked trees, corners, natural objects, &c.; *It was held*, some evidence from which a jury might locate the land in controversy. *Ibid.*

50. In order to prove fraud, the conversations of those who are charged as the perpetrators thereof, which accompany and explain the fraudulent acts, are admissible in evidence. *Davis* v. *Council*, 725.

51. A witness who admits that he participated in the perpetration of a fraud, is impeached, and it is competent to corroborate his testimony by evidence of similar statements before made by him. *Ibid.*

52. While it is a general rule of evidence, that the acts and declarations of a person, in the absence of the prisoner, are not admissible in evidence against him, yet there are exceptions, one of which is in case of a conspiracy to do an unlawful act, when the acts and declarations of conspirators, in furtherance of the common purpose, are competent, although made in the absence of the others. *State v. Anderson*, 732.

53. The least degree of consent or collusion between parties to an illegal transaction, makes the act of one the act of the others. *Ibid.*

54. Where, in order to admit the acts and declarations of a third person as evidence against the prisoner, the State alleges that there was a conspiracy, the regular method of proceeding is for the State, in the first place, to establish the fact of a conspiracy by proof, but the Judge, in his discretion, may allow the acts and declarations to be given in evidence, the solicitor undertaking to prove the conspiracy at a later stage of the trial. *Ibid.*

55. The acts of the different parties alleged to be conspirators may be given in evidence to prove the conspiracy. *Ibid.*

56. The rejection of evidence by the Court, which, if admitted, would have been prejudicial to the prisoner, cannot be assigned as error. *Ibid.*

57. The declaration of a conspirator, at the very time of the homicide, who was in close proximity to, but not within sight of, the prisoner, upon hearing a pistol shot, that the prisoner had killed some one, is admissible in evidence. *Ibid.*

58. To constitute *res gestæ* there must be *an act* which may be explained by contemporaneous declarations. So, where it was alleged that there was a conspiracy between a person and the prisoner to take possession of a certain mine, in doing which the homicide took place, the declarations of such person, when setting out to take possession of the mine, as to his motives in doing so, are not competent evidence for the prisoner. *Ibid.*

59. On a trial of an indictment the acts and declarations of another party tending to show that he committed the offence are inadmissible. *State* v. *Gee*, 756.

60. When the crime is shown to have been committed by a single person and the question is one of identification, it would be competent to prove that another than the accused did the act; but this must be done by proof direct to the fact and not by admissions or conduct seemingly in recognition of it. *Ibid.*

61. It is incompetent to prove by a witness who does not know the general reputation of the accused, who was once a slave, what his former master said of him. *Ibid.*

62. The Court having charged the jury that every material circumstance must be proved beyond a reasonable doubt and that they must all point to the guilt of the prisoner and exclude every reasonable theory of his innocence, and produce moral certainty of his guilt, it is not *error* to refuse to tell the jury that the circumstances must satisfy them as fully as if direct proof of the act had been produced. *Ibid.*

63. When a witness was not sworn, and the fact was not discovered until after the jury had retired; *It was held*, not to entitle the accused to a new trial as a matter of law. The correction of such omissions is left to the discretion of the Judge to set aside the verdict and grant a new trial. *Ibid.*

64. Exceptions to evidence, except to such as is made incompetent by statute on grounds of public policy, if not made in apt time, are deemed to be waived, and cannot be afterwards assigned as error. *Ibid.*

65. When there is a direct conflict between the testimony of a witness and of the defendant, who offers himself as a witness, and evidence is introduced to show the good character of the witness, it is legitimate ground of comment by the solicitor, that no witness was offered to show the good character of the defendant. *State* v. *Davis*, 764.

66. Where a defendant offers himself as a witness, he occupies the same position as any other witness. He is entitled to the same protection and privileges, and is equally liable to be impeached and discredited. *Ibid.*

67. The declarations or confessions of a prisoner, either at the time when he is arrested or when he is charged with the crime, are admissible either for or against him when they are voluntarily made, and it is only necessary that the prisoner should be cautioned that he is at liberty to refuse to answer, and that such refusal will not prejudice him when the confession is made upon an examination before a magistrate. *State* v. *Howard*, 772.

68. Where it appeared that the officer making the arrest was accompanied by two other men, and that they were all large, strong men, but were not armed, and the prisoner was a small, weakly man, but that no threats or violence were used and no inducements held out; *Held*, that confessions could not be excluded on the ground that the defendant was put in fear by force and numbers. *Ibid.*

69. Where it was in evidence that the prisoner and the deceased had gone into a barn together, a witness who passed the barn about a-half an hour afterwards can testify to a conversation he overheard between persons in the

barn, although he does not know the prisoner's voice, and can only identify the voice of the deceased. *Ibid.*

70. It is never necessary to show a motive for the commission of a crime in order for a conviction. But when the prosecution relies upon circumstantial evidence, it is always competent to introduce evidence tending to prove a motive. *State* v. *Green*, 779.

71. So, in an indictment for burning a mill, after evidence has been introduced tending to convict the prisoner, the prosecution may offer evidence tending to show that the prisoner was to be paid for committing the crime, and his declarations shortly before the fire, that he had no money, but expected to have some soon, and the fact that shortly after the fire he did have money, are competent. *Ibid.*

72. The regular mode of trial of indictments is for the State to introduce evidence to sustain the charge; the accused then introduces evidence to make good his defence. Then the State has only the right to introduce rebutting evidence, and evidence strictly to strengthen and support that offered at first. After this, further introduction of evidence is matter of discretion with the Judge, and not reviewable, unless perhaps in case of a clear abuse of power. *State* v. *Lemon*, 790.

73. When defendant swore that he sent his wife to a person to borrow money with which he paid for the property alleged to have been stolen, having thus made her his agent, it is competent for the State to prove what the wife said to this person when she got the money as to the purpose it was intended to serve. *Ibid.*

74. Where the prisoner, being in jail on a criminal charge, told a party to see the prosecutor and find out if he would consent that the defendant receive 39 lashes and be discharged; *Held*, that such message is relevant and admissible in evidence *State* v. *DeBerry*, 800.

75. Where the Judge below is requested to charge that there is no evidence of a fact in issue, the evidence most favorable to the adverse party must be considered alone, and if it is any evidence at all to establish the fact, the charge must be refused. *State* v. *Horne*, 805.

76. In an indictment for murder, evidence of the general reputation of the deceased as a violent man, is only admissible when there is other evidence tending to show that the killing was done in self-defence, or when the evidence is wholly circumstantial, and the character of the transaction is in doubt. *State* v. *McNeill*, 812.

77. The law presumes that every one intends to produce the consequences that result from his acts, but this presumption is not conclusive, but only *prima facie* evidence of the intent. *State* v. *Barbee*, 820.

78. Where the defendant was indicted under section 1100 of *The Code*, for shooting at a train, with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the Court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted. *Ibid.*

79. Where a witness has been impeached, in order to corroborate him, he may be allowed to testify to statements made by him about the same matter

shortly after it occurred, corroborating his evidence given on the trial. *State* v. *Whitfield*, 831.

80. A witness may be discredited by the nature of his evidence, by the circumstances surrounding him, or by imputations directed against him on cross-examination, as well as by direct evidence introduced to show the untruthfulness of his testimony. *Ibid.*

EVIDENCE, Sec. 590:

1. Where an executor or administrator is examined in his own behalf, concerning a transaction or conversation with his decedent, the other party to the action is competent to testify concerning the same transaction or communication. *Burnett* v. *Savage*, 10.
2. An administrator has no power to rescind a contract to purchase land, made by his intestate, and where in an action brought to declare such attempted rescission a nullity, it appeared that the vendor had paid to the administrator a sum of money for which the rescission was the consideration; *Held*, that the administrator had such an interest as made him incompetent to testify. *Owens* v. *Phelps*, 231.
3. A party to an action is not permitted to testify in his own behalf against the executor, administrator, &c., of a deceased person, unless the executor or administrator, &c., is examined, or the testimony of the deceased person is given in evidence, when the door is opened to the opposing party to testify for himself, but only as to those particular transactions and communications to which the testimony of the deceased person or his representative was pertinent. *Sumner* v. *Candler*, 634.

EXCUSABLE NEGLIGENCE:

1. This Court cannot review the findings of fact of the court below on a motion under section 274 of *The Code*. *Branch* v. *Walker*, 87.
2. Where a Judge made a general order allowing parties time to file pleadings, but after leaving the court-house for the term he made an order allowing plaintiffs, who desired judgments for want of answers, to note on the summons docket that answers would be required during the term; *Held*, a judgment for want of answer, under such circumstances, will be set aside for excusable neglect. *Ibid.*
3. His Honor in the court below refused to extend the time to file an answer, and signed a judgment, but stated that if an answer was filed before 12 o'clock at night of the last day of the term, he would strike out the judgment. An answer was filed before 12 o'clock but the judgment was not stricken out; *Held*, excusable neglect. *Warren* v. *Harvey*, 137.
4. The refusal of the Judge to extend the time to file an answer is not *res adjudicata* in this motion to set aside such judgment for excusable neglect. *Ibid.*
5. Where, in setting aside a judgment for excusable negligence, the Judge does not state the ground on which he founded his order, his action will be upheld, if in any aspect of the case it would be proper. *Foley* v. *Blank*, 476.

6. The Supreme Court can review on appeal what is mistake, surprise or excusable neglect under section 274 of *The Code*, but it cannot review the discretion exercised by a Judge of the Superior Court under that section. *Ibid.*

7. Where the Judge left the Court before the end of the term, but did not adjourn the Court, leaving it to expire by its own limitation, and a judgment by default was entered against a defendant, who filed an answer before the expiration of the term, but after the departure of the Judge; *Held*, excusable negligence. *Ibid.*

EXECUTION:

1. Where, in an action by an executor, the defendant pleads that the fund is not needed for the payment of debts, and that he has purchased the interest of a number of the legatees; *Held*, that while it cannot defeat the action, yet upon paying the amount of the shares which he has not purchased, the defendant is entitled to a *cessat executio*. *Rogers* v. *Clements*, 81.

2. It is the duty of the sheriff, when selling land under execution, to lay off the homestead, even when the execution is issued upon a judgment for an old debt, to which the homestead does not apply. *Arnold* v. *Estis*, 162.

3. When the sheriff sells land to which the homestead does apply without assigning it, *it seems* that the sale is void. *Ibid.*

4. Creditors cannot sell land fraudulently conveyed, without having the homestead assigned to the fraudulent donor—for by the conveyance of the homestead, the creditor has not been obstructed in his remedy. *Ibid.*

5. A judgment by consent cannot be set aside by one of the consenting parties when an execution issued thereon has been satisfied. *Moore* v. *Grant*, 316.

6. After a motion to recall an execution and set aside a judgment has been once heard and refused upon full evidence, it becomes *res adjudicata*. *Ibid.*

7. The homestead law is not void as to debts contracted before its adoption, and is inoperative only when such debts could not otherwise be collected out of the debtor's property. *Lowdermilk* v. *Corpening*, 333.

8. The homestead should be allotted when executions are issued on such debts, and the excess first applied to the payment of the execution, and if sufficient for that purpose the debtor should be allowed to retain his homestead. *Ibid.*

9. Where an execution issued on such debt, and the sheriff sold the real property of the debtor subject to the homestead, the purchaser acquired the reversion after the termination of the homestead. *Ibid.*

10. The Act of the 25th of March, 1870, which prohibits the sale of the reversionary interest in land charged with the homestead exemption, cannot deprive a creditor of a vested right acquired by docketing his judgment before the act was passed. *Ibid.*

11. A purchaser under execution sale takes all that belongs to the debtor and nothing more. A greater estate or interest than the debtor owned cannot be conveyed thereby. *Dail* v. *Freeman*, 351.

12. A sale by the sheriff relates to the date of the judgment so as to defeat all conveyances and incumbrances upon the land subsequently made, but it has no application to the crops raised on the land after the rendition of the judgment, but before the sale. *Ibid.*

13. So, where a tenant makes an agricultural lien, and afterwards the land is sold under execution as the property of the landlord; *It is held*, that the owner of the lien has a right to the crop superior to the purchaser at execution sale. *Ibid.*

14. A judgment creditor has neither *jus in re* nor *jus ad rem* in the judgment debtor's land, but only the right to make his lien effectual by a sale under execution. *Ibid.*

15. In an action on a bond to stay execution on appeal from a justice's judgment it is not necessary to allege that the plaintiff has sustained damage on account of the appeal. *McMinn* v. *Patton*, 371.

16. Before the Act of 1879, ch. 68 (*Code*, sec. 884), a civil action and not a motion in the cause was the proper way to proceed against the sureties on such bond. *Ibid.*

17. Where the purchaser, at execution sale, is a stranger to the judgment, he gets a good title, although the sheriff may have failed to advertise the property and give notice to the judgment-debtor, as prescribed by §§456 and 457 of The Code. All that such purchaser is required to ascertain is, that it is an officer who sells, and that he is empowered to do so by an execution issued by a court of competent jurisdiction. *Burton* v. *Spiers*, 503.

18. But when at such sale, the plaintiff in the execution or his attorney or agent, or any other person affected with notice of such irregularity, purchases, the sale may be set aside at the instance of the defendant in the execution, by a direct proceeding for that purpose. *Ibid.*

19. Execution sales cannot be *collaterally* avoided because of irregularities in the manner in which they have been conducted. *Ibid.*

20. When there is fraud and collusion between the sheriff and the purchaser at execution sale, the sale is absolutely void, and such defect may be taken advantage of by any one interested in the property sold; but when the fraud results from the conduct of the plaintiff alone, as in suppressing bidding, &c., there being no collusion between the sheriff and the purchaser, the sheriff's sale passes the title, and the execution debtor must seek his relief in equity. *Ibid.*

EXECUTOR:

1. Where, in an action by an executor, the defendant pleads that the fund is not needed for the payment of debts, and that he has purchased the interest of a number of the legatees; *Held*, that while it cannot defeat the action, yet upon paying the amount of the shares which he has not purchased, the defendant is entitled to a *cessat executio*. *Rogers* v. *Clements*, 81.

2. Where a plaintiff sues as executor, the production of letters testamentary issued to him is sufficient to show that the testator's right of action has become vested in him. It is not necessary to annex a copy of the will to the letters, when the provisions of the will are not involved in the prosecution of the action. *Pendleton* v. *Dalton*, 185.

3. Where an executor sold property of his testator in July, 1863, on nine months credit, he is liable for the scaled value of the money for which it sold, at the time of the sale and not at the expiration of the time of credit. *Depriest* v. *Patterson*, 399.

4. An executor during the war took certain notes belonging to the estate of his testator, and substituted for them Confederate money of his own. The notes proved to be worthless; *Held*, that he is chargeable with the scale value of the Confederate money at the date of the attempted substitution. *Depriest* v. *Patterson*, 402.

5. Where an executor swears that certain Confederate money was the property of the estate, but is unable to explain by whom it was paid, or how he is able to remember the character of the fund as being a part of the trust estate; *Held*, not sufficient to relieve him from liability. *Ibid.*

6. Where an executor attempts to pay his individual debts out of the assets of his testator he commits a *devastavit*. *Grant* v. *Edwards*, 442.

7. Where a legatee, who is also executor, misapplies any of his testator's estate, it must be deducted from his legacy. *Grant* v. *Edwards*, 447.

8. Where an executor proves the will, he cannot elect to take against the will. So where a testator was indebted to the person he appoints his executor and leaves certain property to the executor in payment of the debt, which proved to be of less in value than the amount of the debt, the executor, after proving the will, cannot elect to assert his rights as a creditor and retain his debt out of other assets of the estate. *Syme* v. *Badger*, 706.

9. It is immaterial that the executor acted under a mistaken idea of the legal consequences of proving the will. *Ibid.*

10. An executor is only required to act in good faith and with reasonable care in the management of the estate. *Ibid.*

11. Where an executor did not collect a debt, under the impression that it belonged to him personally, he will only be held accountable to the estate for the part of such debt as he actually collects. *Ibid.*

12. Where an executor takes a security in his own name for a debt due the estate, it is not, in the absence of fraud and improper purpose, a devastavit. *Ibid.*

EXECUTORY DEVISES:

Where there is a devise in fee, with an executory devise over, the wife's right to dower attaches on the first estate, and is not defeated on its termination. *Pollard* v. *Slaughter*, 72.

EXONERATION:

The rule that the personal estate must be used in discharging debts secured upon real estate, in order to its exoneration, operates among persons who derive their interest directly from the deceased owner, and does not extend to creditors secured by a mortgage. These must first exhaust the appropriated land, and look to the personality only for the residue. *Moore* v. *Dunn*, 63.

EXPERTS:

The testimony of experts to prove or disprove hand-writing is not of as much weight as that of persons who saw the paper signed, or to whom the party signing had acknowledged his signature, and it is not error for the presiding Judge to so charge the jury. *Burly* v. *Buxton*, 479.

EXTINGUISHMENT:

Where one and the same person in two representative capacities becomes both debtor and creditor, the law appropriates the fund, and extinguishes the debt. But this principle does not extend to the case of an agent of several principals. *Grandy* v. *Abbott*, 33.

FEE SIMPLE:

1. If lands are conveyed to a corporation aggregate, it will, from the nature of such corporations, be understood as a fee without any words of limitation. *Asheville Div.* v. *Aston*, 578.
2. Although the existence of a corporation be limited to a certain number of years, yet it is capable of holding estates in fee. *Ibid.*
3. The second-story in a house, when held separately, may be recovered in an action of ejectment. *Ibid.*
4. When the habendum and warranty clause of a deed are joined, and the intention to convey a fee is clear, the words of inheritance will be so transposed as to connect them with the conveying terms, so as to secure the intended effect of the deed. *Staton* v. *Mullis*, 623.

FILING PLEADINGS:

A pleading placed on the files of the Court after the Judge has left for the term, is not filed in contemplation of law. *Foley* v. *Blank*, 476.

FORECLOSURE:

1. In the absence of express stipulations in the mortgage, a mortgagor is not entitled to notice of the intention of the mortgagee to foreclose. *Manning* v. *Elliott*, 48.
2. Where an action is brought to enjoin a sale under a power of sale contained in the mortgage, the court, having acquired jurisdiction of the parties and the subject matter, may direct a sale of the land, and is not bound to direct such sale in strict accordance with the terms of the mortgage deed. *Ibid.*

3. In a foreclosure sale of land by order of Court, the Court has the power to re-open the bidding, and order the land to be sold a second, and possibly a third time, for extraordinary cause, but the power should be exercised cautiously. *Hinson* v. *Adrian*, 121.

FORFEITURE:

1. A corporation, chartered for the purpose of promoting temperance, does not forfeit real estate which it has purchased, because it ceases to pursue the objects for which it was incorporated. *Asheville Div.* v. *Aston*, 578.
2. A corporation cannot endure longer than the time prescribed by its charter, and no judicial proceedings are necessary to declare a forfeiture for such a cause, but for any other cause of forfeiture a direct proceeding must be instituted by the sovereign to enforce the forfeiture, and it cannot be taken advantage of in any collateral proceeding. *Ibid.*

FORGERY:

1. Where the prisoner was indicted for forging an order for the payment of money, with intent to defraud the Randleman Manufacturing Company, but the indictment failed to allege that the Randleman Manufacturing Company was a corporation; *Held*, immaterial. *State* v. *Shaw*, 768.
2. The corporate existence may be proved, although not alleged in the bill of indictment. *Ibid.*
3. Where the forged instrument is set out in the indictment *in totidem verbis*, it shows its own nature, and corrects any error in miscalling it in the indictment. *Ibid.*

FRAUD:

1. The mere threat to employ force, or procure the arrest of the obligor in a bond if he refused to accept Confederate money in payment unaccompanied by any attempt to put the threat into execution, is not fraudulent *per se*. *Simmons* v *Mann*, 12.
2. The simple act of a guardian receiving Confederate money on debt due the estate of his wards in the year 1863, was not fraudulent, or the evidence of fraud as to them. *Ibid.*
3. Where the jury found that the defendant administrator had, in another action in which he was plaintiff, fraudulently suffered a judgment to be entered, by which the estate of his intestate was cheated; *It was held*, that a motion would not be allowed to reinstate said action and set aside fraudulent judgment. *Sherner* v. *Spear*, 148.
4. Courts of justice will not aid a party to a fraudulent transaction to force his confederates in fraud to account. *Ibid.*
5. Obtaining a judgment by fraud does not make it irregular. *Williamson* v. *Hartman*, 236.
6. When there is fraud and collusion between the sheriff and the purchaser, at execution sale, the sale is absolutely void, and such defect may be taken advantage of by any one interested in the property sold; but when

the fraud results from the conduct of the plaintiff alone, as in suppressing bidding, &c., there being no collusion between the sheriff and the purchaser, the sheriff's sale passes the title, and the execution debtor must seek his relief in equity. *Burton* v. *Spiers*, 503.

7. A consent judgment may be set aside for fraud. *Vaughan* v. *Gooch*, 524.

8. An account stated may be opened for fraud. *Gooch* v. *Vaughan*, 610.

9. In order to prove fraud the conversations of those who are charged as the perpetrators thereof, which accompany and explain the fraudulent acts, are admissible in evidence. *Davis* v. *Council*, 725.

10. A witness who admits that he participated in the perpetration of a fraud, is impeached, and it is competent to corroborate his testimony by evidence of similar statements before made by him. *Ibid.*

11. A purchaser from a fraudulent donee, in order to get a good title, must purchase without notice of the fraudulent character of his vendor's title. *Ibid.*

FRAUDULENT CONVEYANCE:

1. Creditors cannot sell land fraudulently conveyed, without having the homestead assigned to the fraudulent donor—for by the conveyance of the homestead, the creditor has not been obstructed in his remedy. *Arnold* v. *Estes*, 162.

2. Where a father in view of the intended marriage of his daughter makes a deed to her and her intended husband for a tract of land, as an inducement to the marriage; *Held*, a valuable consideration. *Ibid.*

3. Where the application for a receiver is based upon the alleged fraudulent character of a conveyance, the question of whether or not the deed is fraudulent belongs to the final hearing of the cause, and the alleged fraud will only be considered on such motion for a receiver, as showing grounds for the protection of the fund until the final hearing. *Rheinstein* v. *Bixby*, 307.

4. In such case, a receiver will not be appointed, unless it is manifest that the fund is mismanaged and in danger of being lost, or where the insolvency of an unfit trustee is present or imminent. *Ibid.*

5. Where, in a voluntary assignment to secure creditors, a debtor has the intent to hinder and delay one certain creditor, the deed is fraudulent and void, although neither the trustee nor the beneficiaries under the deed participated in or knew of such fraudulent intent. *Savage* v. *Knight*, 493.

6. Where the conveyance is absolute and for a valuable consideration, it is not fraudulent and void as to creditors although the grantor had a fraudulent intent in its execution, unless the grantee participated in such intent. *Ibid.*

7. Where a deed is fraudulent and void as to one creditor, it is void as to all. *Ibid.*

8. Where the validity of a deed alleged to be fraudulent depends upon the intent with which it was made, such intent is a fact to be submitted to the jury. *Ibid.*

9. Where there is reason to apprehend that the subject of the controversy will be destroyed, or removed, or otherwise disposed of by the defendants, pending the action, so that the plaintiff may lose the fruit of his recovery, the Court will take control of it by the appointment of a receiver, or by the grant of an injunction, or by both, if necessary, until the action shall be tried on its merits. *Ellett* v. *Newman*, 519.

10. Where a husband makes a gift of land to his wife, without any valuable consideration, but it is admitted he had no fraudulent intent, and he retains property sufficient to pay all of his debts in existence at the time of the gift, it is not fraudulent as to creditors. *Taylor* v. *Eatman*, 601.

11. To make a deed fraudulent as to subsequent purchasers, such purchaser must have paid *full value* for the land, and must also have purchased without notice of the prior voluntary conveyance. *Ibid.*

12. The registration of the prior voluntary deed, is notice to subsequent purchasers. *Ibid.*

13. A purchaser from a fraudulent donee, in order to get a good title, must purchase without notice of the fraudulent character of his vendor's title. *Davis* v. *Council*, 725.

FRIVOLOUS ANSWER:

In an action to foreclose a mortgage, the defendants in their answer admitted the execution of the note and mortgage, and the amount due thereon, but alleged as a defence, 1st. That the land had been sold under judgments docketed prior to the execution of the mortgage, and that they had acquired a life-estate in the land from the purchaser at execution sale. 2d. That the defendants own no other real estate from which they can get a homestead; and, 3d. That when the mortgage was executed, they delivered to the mortgagee other securities as additional security for the debt; *Held*, that the answer raises no material issue, either of law or fact, and is frivolous. *Weil* v. *Uzzell*, 515.

GRANT:

A grant from the State will be presumed from thirty years' possession, although no privity can be traced between the successive occupants. *Dills* v. *Hampton*, 565.

GUARDIAN *ad litem*:

1. So, where an infant was duly served with process, and a guardian *ad litem* was appointed, but no process was served on the guardian, nor did he make any defence, and it only appeared inferentially that he knew of the pendency of the action; but it did not appear that the infant had any defence, and adults whose rights were identical with his own, sued in the same action, made no defence; *It was held*, that the judgment was not so irregular that it would be set aside on an application made several years thereafter. *Williamson* v. *Hartman*, 236.

2. A judgment rendered against an infant who has never been served with process, and who has no general guardian or guardian *ad litem*, is void. *Stancill* v. *Gay*, 462.

GUARDIAN AND WARD:

The act of receiving Confederate money by a guardian in 1863 on a debt due to his ward, is neither fraudulent nor evidence of fraud as to the ward. *Simmons* v. *Mann*, 12.

HABENDUM:

When the habendum and warranty clause of a deed are joined, and the intention to convey a fee is clear, the words of inheritance will be transposed so as to connect them with the conveying terms, so as to secure the intended effect of the deed. *Staton* v. *Mullis*, 623.

HOMESTEAD:

1. Where, in an action brought by mortgagees and judgment creditors to have the mortgaged property sold for the payment of the mortgages and judgments, a sale is made without objection by the debtor, it is too late for the debtor to ask for a homestead by metes and bounds after such sale has been made His homestead can be paid to him in money. *Hinson* v. *Adrian*, 121.
2. A mortgagor is entitled to a homestead in an equity of redemption, and if the land is certainly of greater value than the mortgage debt, the homestead may be assigned by metes and bounds, but if by doing so the value of the homestead would be impaired, it is competent to order a sale, and assign the homestead in the money arising therefrom. *Ibid.*
3. It is the duty of the sheriff, when selling land under execution, to lay off the homestead, even when the execution is issued upon a judgment for an old debt, to which the homestead does not apply. *Arnold* v. *Estis*, 162.
4. When the sheriff sells land to which the homestead does apply without assigning it, *it seems* that the sale is void. *Ibid.*
5. The debtor is entitled to his homestead, where judgment is rendered on a note given since the passage of the homestead laws, but for an indebtedness contracted prior to that time. *Ibid.*
6. *It seems*, that he is so entitled, when judgment is rendered on an account some of the items of which were contracted prior, and some subsequent to the passage of the homestead law. *Ibid.*
7. Creditors cannot sell land fraudulently conveyed, without having the homestead assigned to the fraudulent donor—for by the conveyance of the homestead, the creditor has not been obstructed in his remedy. *Ibid.*
8. Since the Act of 1876–'7, ch. 253, a docketed judgment is no lien on the homestead. *Utley* v. *Jones*, 261.
9. Where the homestead is sold under mortgage, and at the time of the sale there are docketed judgments against the mortgagor, he has the right to have the entire residue after paying the mortgage paid over to him, and judgment creditors, having no lien, have no right to have the fund held for them until the determination of the homestead right. *Ibid.*
10. Where a party is ordered to pay money into court, or be attached for contempt in failing to do so, and swears that after every effort it is out of his

power to pay it, the rule for contempt will be discharged; but where, on a return to the rule, he does not swea that he cannot borrow the money, and does show that he has some personal property, although exempt from seizure under final process for the payment of debts as personal property exemptions, the rule will not be discharged. *Smith* v. *Smith*, 304.

11. The homestead law is not void as to debts contracted before its adoption, and is inoperative only when such debts could not otherwise be collected out of the debtor's property. *Lowdermilk* v. *Corpening*, 333.

12. The homestead should be allotted when executions are issued on such debts, and the excess first applied to the payment of the execution, and if sufficient for that purpose the debtor should be allowed to retain his homestead. *Ibid.*

13. Where an execution issued on such debt, and the sheriff sold the real property of the debtor subject to the homestead, the purchaser acquired the reversion after the termination of the homestead. *Ibid.*

14. The Act of the 25th of March, 1870, which prohibits the sale of the reversionary interest in land charged with the homestead exemption, cannot deprive a creditor of a vested right acquired by docketing his judgment before the act was passed. *Ibid.*

15. *It seems* that under some circumstances a mortgagee may be required to sell a part of the mortgaged land sufficient to satisfy his debt, in order that the mortgagor may have a homestead allotted in the residue. *Weil* v. *Uzzell*, 515.

16. The act declaring that the statute of limitations shall not run against any debt owing by the holder of a homestead, which is affected by the act forbidding the sale of the reversion (Bat. Rev., ch. 55, §26), has been repealed. *Cobb* v. *Halyburton*, 652.

17. The statute begins to run against such debts from November 1, 1883, when the repealing act went into effect. *Ibid.*

18. The homestead act is not *ipso facto* void even against debts contracted prior to the adoption of the constitution. It becomes so only when the debtor has no other property, which can be subjected to the payment of such debts. *Ibid.*

19. In 1869, the plaintiff's intestate obtained judgments against the ancestor of the defendants, on debts contracted in 1866, and a homestead was allotted to the defendant, which, at his death, was re-allotted to his infant children, the present defendants. A petition was filed by the debtor's administrator to sell the homestead to make assets to pay the judgments; *Held*, 1st, that by assenting for so long a time to the homestead allotment, and by availing themselves of the provision of the statute, which prevented their judgments from being barred, the creditors were precluded from denying the right of the infants to the homestead; 2d, that the creditors were entitled to have the reversion after the determination of the homestead, not the absolute estate in the land, sold to pay their debts. *Ibid.*

HOMICIDE:

1. It is unnecessary to aver, in an indictment, any matter which need not be proved. So where an indictment for murder did not set out that "the

prisoner, not having the fear of God before his eyes, but being moved and seduced by the devil," and also did not set out that the "deceased was in the peace of God and the State;" *It was held*, no ground to arrest the judgment. *State* v. *Howard*, 772.

2. Where an indictment for murder sets out the infliction of a mortal wound, and that the deceased "then and there instantly died," it is a sufficient averment that the deceased died within a year and a day from the time of the infliction of the wound. *Ibid.*

3. The doctrine of cooling time only applies when there has been legal provocation. *State* v. *McNeill*, 812.

4. No words, however insulting, and no actions or gestures expressive of contempt, unaccompanied by indignity to the person, by a battery, or at least an assault, amount to a legal provocation so as to mitigate a slaying from murder to manslaughter. *Ibid.*

5. Where a violent altercation in words had taken place between the prisoner and the deceased, and, after being separated for between five and ten minutes, they again come together, and, after angry and insulting words pass between them, prisoner shoots the deceased, the killing is murder and not manslaughter. *Ibid.*

HUSBAND AND WIFE:

1. A husband may be the agent of his wife. *Harper* v. *Dail*, 394.

2. The duty of maintenance which a husband owes to his wife is a sufficient consideration for a voluntary deed of land made by him to her, and a court of equity will sustain such a conveyance, although it is void at law. *Taylor* v. *Eatman*, 601.

3. Where a husband makes a gift of land to his wife, without any valuable consideration, but it is admitted he had no fraudulent intent, and he retains property sufficient to pay all of his debts in existence at the time of the gift, it is not fraudulent as to creditors. *Ibid.*

4. A *feme covert*, who is the donee of a power of appointment, either collateral, appurtenant or in gross, may execute the power without the consent of her husband, and she may even execute it in his favor. *Ibid.*

IMPRISONMENT:

1. But where the Court adjudges that the defendant be fined and imprisoned, and the fine is paid and part of the imprisonment undergone, the Court cannot, even at the same term, recall and suspend the judgment, and at a subsequent term sentence him again for the same offence. *State* v. *Warren*, 825.

2. No person can be twice punished for the same offence, and the second judgment under such circumstances is void. *Ibid.*

3. *It seems*, that with the consent of the convict, the Court may sub-divide the term of imprisonment, so that a portion of it may be suffered at one time and the residue at another. *Ibid.*

4. There were three indictments against a prisoner, to one of which he pleaded guilty, and judgment was suspended on the payment of costs. He was found guilty on the other two, on one of which he was sentenced to imprisonment for ten days. After remaining in jail for the term of his imprisonment and twenty days additional, the prisoner took the oath prescribed for insolvent debtors and persons imprisoned for the costs and fine in a criminal prosecution, and applied for his discharge; *Held*, that he was entitled to his discharge in all three cases. *State* v. *McNeely*, 829.

INCUMBRANCE:

1. Where the defendant gave his bond to the plaintiff for a sum of money, which was part of the purchase money for a tract of land, to be paid when the plaintiff should remove from said property "all claims, trespasses or incumbrances," and give the defendant possession of the same; *Held*, that the incumbrances intended were such as, at the execution of the bond, had some foundation in right, or at least color of right, and not such as might be set up arbitrarily and groundlessly by a mere pretender, and the trespasses were such as intruders were perpetrating on the land at the time the bond was executed. *Abernathy* v. *Stowe*, 213.

2. A sale by the sheriff relates to the date of the judgment so as to defeat all incumbrances upon the land subsequently made. *Dail* v. *Freeman*, 351.

INDICTMENT:

1. Where the prisoner was indicted for forging an order for the payment of money, with intent to defraud the Randleman Manufacturing Company, but the indictment failed to allege that the Randleman Manufacturing Company was a corporation; *Held*, immaterial. *State* v. *Shaw*, 768.

2. The corporate existence may be proved, although not alleged in the bill of indictment. *Ibid.*

3. Where the forged instrument is set out in the indictment *in totidem verbis*, it shows its own nature, and corrects any error in miscalling it in the indictment. *Ibid.*

4. It is unnecessary to aver, in an indictment, any matter which need not be proved. So where an indictment for murder did not set out that "the prisoner, not having the fear of God before his eyes, but being moved and seduced by the devil," and also did not set out that the "deceased was in the peace of God and the State;" *It was held*, no ground to arrest the judgment. *State* v. *Howard*, 772.

5. Where an indictment for murder sets out the infliction of a mortal wound, and that the deceased "then and there instantly died," it is a sufficient averment that the deceased died within a year and a day from the time of the infliction of the wound. *Ibid.*

6. The indictment in this case, set out in full in the opinion, sufficiently charges the crime of burning a gin-house, created by section 985, subdivision 2 of *The Code*. *State* v. *Green*, 779.

7. Where, in an indictment, a word, not used in the statute, is substituted for one so used, the indictment will be sustained, if the substituted word is of equivalent or more extensive signification. *State* v. *Butts*, 784.

8. An indictment is fatally defective, if it join two defendants charged with an offence which cannot be jointly committed. *State* v. *Deaton*, 788.

9. After conviction the defendant moved in arrest of judgment, because the indictment did not state "the circumstances under which the words were spoken by which the *attempt* is charged to have been made: *Held*, that this was not required; and that in indictments which charge statutory offences it is not only sufficient to use the words of the statute, but it was necessary to do so, or at least to use words of equivalent import. *Held further*, that the offence defined in the statute—*The Code*, §1113—is the attempt to destroy the reputation of an innocent woman, and when the indictment is for attempting to commit an offence, an exactness as great as in one which charges the offence itself is not essential. *State* v. *McIntosh*, 794.

10. An indictment for injury to stock must charge that the cattle abused or killed were the property of some one; the abusing or killing must be charged to have been wilfully and unlawfully done, and while the animal was in an enclosure not surrounded by a lawful fence. *State* v. *Deal*, 802.

11. Where the words of a statute are descriptive of an offence, an indictment under the statute must follow the words of the statute. *Ibid.*

12. Indictment charged defendant with removal of part of crop made on the land under a lease executed on 1st November, 1883, and running one year. The proof was that defendant removed part of crop made in 1883 under a lease made in March, 1883; *Held*, that the offence proved is different from that charged in the indictment. *State* v. *Ray*, 810.

13. It is not sufficient to prove an offence of like kind, and treat that as the offence charged; when the facts essential to constitute the offence are numerous, they must be alleged with particularity, and proved as alleged. *Ibid.*

14. The purpose of the indictment is to inform accused with certainty and in an intelligent manner of the offence charged against him. *Ibid.*

INFANT:

1. Where an infant was duly served with process, and a guardian *ad litem* was appointed, but no process was served on the guardian, nor did he make any defence, and it only appeared inferentially that he knew of the pendency of the action; but it did not appear that the infant had any defence, and adults whose rights were identical with his his own, sued in the same action, made no defence; *It was held*, that the judgment was not so irregular that it would be set aside on an application made several years thereafter. *Williamson* v. *Hartman*, 236.

2. A judgment rendered against infant defendants, who have never been served with process, and who have no general or testamentary guardian nor guardian *ad litem*, is void. *Stancill* v. *Gay*, 462.

3. The receipt of money under such judgment by the infants, does not give vitality to the judgment. They may be made to account for the amounts received in another action. *Ibid.*

4. The Code, sec. 387, making valid judgments against infants and certain other persons, in cases where, being parties defendant, they are not per-

sonally served, does not apply to cases where there has never been any service upon the infant, nor upon any person representing him. *Ibid.*

5. The assent of infants will be presumed to a deed made to them as a gratuity at the instance of their mother for a valuable consideration moving from her, and, in order to avoid it, the infants must repudiate it after arriving at full age. *Gaylord* v. *Respass*, 553.

INJUNCTION:

1. Where a mortgager seeks to enjoin the mortgagee from selling on the ground that the debt is tainted with usury, the injunction will not be granted, if the creditor waives the usurious part of the contract. *Manning* v. *Elliott*, 48.

2. An injunction will not be granted to restrain the execution of a power of sale in a mortgage, unless the debtor tenders the amount justly due with lawful interest. *Ibid.*

3. Where an action is brought to enjoin a sale under a power contained in a mortgage, the court having acquired jurisdiction of the parties and the subject matter, may direct a sale of the land, and is not bound to direct such sale in accordance with the terms contained in a deed. *Ibid.*

4. It is error to dismiss an action upon refusing to continue an injunction to the hearing. The Court should refuse the application to continue the injunction but allow the action itself to proceed. *Bradshaw* v. *Commissioners*, 278.

5. Supplemental proceedings are substituted in the present system of procedure for the method of granting relief in equity in the former system, and to accomplish their purpose of reaching the judgment-debtor's property of every kind that cannot for any cause be reached by execution, injunctions may be granted and receivers appointed in them as occasion may require. *Coates* v. *Wilkes*, 376.

6. The general principles of law applicable to injunctions apply to those asked for in supplemental proceedings. *Ibid.*

7. In applications for receivers and injunctions in supplemental proceedings, the Supreme Court will examine the evidence and pass upon the facts. *Ibid.*

8. The plaintiff executed to the defendant a mortgage to secure the amount due upon a note one year thereafter; before the day of payment she purchased two notes on defendant (who was insolvent), past due, and demanded a credit for the sums due thereon upon her note; the defendant refused to allow the credits and advertised the mortgaged premises for sale; *Held*, that the plaintiff was entitled to have sale enjoined until the issue arising upon the controverted facts was properly tried. *Harrison* v. *Bray*, 488.

9. Whether an interlocutory injunction should be granted in such cases is a question addressed to the *legal* discretion of the Court, to be exercised in accordance with established principles, its purpose being, not to determine the rights involved, but to prevent the perpetration of a wrong, or secure the preservation of the subject of the litigation pending action. *Ibid.*

10. Where there is reason to apprehend that the subject of the controversy will be destroyed, or removed, or otherwise disposed of by the defendants, pending the action, so that the plaintiff may lose the fruit of his recovery, the Court will take control of it by the appointment of a receiver, or by the grant of an injunction, or by both, if necessary, until the action shall be tried on its merits. *Ellett* v. *Newman*, 519.

11. While courts permit the use of powers of sale in mortgages, they regard them with much suspicion and watchfulness, and will enjoin their execution when an attempt is made to use them for the purpose of oppressing or obtaining an unfair advantage over the mortgagor. *Gooch* v. *Vaughan*, 610.

12. Where it appears in an application to enjoin a mortgagee from selling the mortgaged property under the power of sale, that there are many and complicated accounts between the mortgagor and mortgagee, and the balance due is uncertain, the Court will restrain the execution of the power of sale until an account can be stated and the amount due ascertained. *Ibid.*

13. In such case, the rule which requires a mortgagee, in certain cases, to pay the amount admitted to be due before the injunction will be granted, does not apply, because no definite sum is known to be due. *Ibid.*

INJURY TO A DWELLING HOUSE:

The Code, §1082, which makes an injury to a house indictable, does not embrace the case of injury to a building by a lessee during the continuance of his term. *State* v. *Whitener*, 798.

INJURY TO STOCK:

1. Evidence that defendant shot a cow to prevent her from injuring his crops, and that she entered his field at a part of a dividing fence, which the owner of the cow ought to keep in repair, properly rejected. *State* v. *Butts*, 784.

2. Under the statute—*The Code*, §2482—it is a misdemeanor to wound or injure stock even when trespassing on defendant's crops. *Ibid.*

3. In an indictment for injuring stock under section 1003 of *The Code*, if the State fails to prove that the injury was inflicted in an enclosure not surrounded by a lawful fence, the defendant must be acquitted. *State* v. *Deal*, 802.

4. An indictment for such offence must charge that the cattle abused or killed were the property of some one; the abusing or killing must be charged to have been wilfully and unlawfully done, and while the animal was in an enclosure not surrounded by a lawful fence. *Ibid.*

INSANITY:

1. Where pending an action for divorce, the defendant becomes insane, the cause will be continued as long as there is a hope of the defendant's regaining reason. *Stratford* v. *Stratford*, 297.

2. In case of hopeless insanity, it is intimated that the plaintiff will be allowed to proceed with the trial. *Ibid.*

INSURANCE:

1. Where concurrent insurance is effected in different companies, all represented by the same general agent, an examination and valuation made by a subordinate agent of one of the insurers, is admissible in evidence against all who act on his report, and the same rule applies to successive insurance in different companies. *Dupree* v. *Ins. Co.*, 417.
2. The strict accuracy required in applications for insurance, in order to bind the insurer, is in the statement of facts, and not matters of opinion as to the value of the property, unless intended to obtain some unfair advantage. *Ibid.*

INTENT:

1. The law presumes that every one intends to produce the consequences that result from his acts, but this presumption is not conclusive, but only *prima facie* evidence of the intent. *State* v. *Barbee*, 820.
2. Where the defendant was indicted under section 1100 of *The Code*, for shooting at a train, with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted. *Ibid.*

INTEREST:

1. An administrator cannot be charged with interest at eight per cent., because he is indebted to the estate, and has realized that rate on money of his own. *Grant* v. *Edwards*, 442.
2. Where a testator gives to a legatee an estate for life in two-thirds of his estate, but nothing is paid to him, he is not entitled to interest on the amounts which should have been paid him each year. *Grant* v. *Edwards*, 447.

IRREGULAR JUDGMENT:

1. It is only when irregularities are so serious in their nature as to destroy the efficacy of the action and render the judgment void, or when they may seriously prejudice and injure the moving party, that they occasion grounds for setting aside the judgment. *Williamson* v. *Hartman*, 236.
2. What is reasonable time in which the motion must be made, depends upon the circumstances of each case; but when a long period has elapsed and the rights of innocent persons have grown up under judgments, Courts will only set them aside for the most weighty considerations. *Ibid.*
3. Obtaining a judgment by fraud does not make it irregular, and after the action has been determined, the question of fraud can only be tried in a new action brought to impeach the judgment. Before the action has been determined, a party alleging fraud in any previous interlocutory order, may set up such matter by a petition filed in the cause. *Ibid.*

4. A motion to set aside a judgment for irregularity will be entertained after the determination of the action. *Ibid.*

5. A judgment rendered without any complaint having been filed is not necessarily void. Such judgment is valid if rendered by consent, or if ratified by subsequent assent to it. *Stancill* v. *Gay*, 455.

6. An irregular judgment will not be set aside as of course. The moving party must show that the alleged irregularities affect them adversely in a material respect, and that they have exercised due diligence in seeking relief. *Ibid.*

ISSUES:

1. It is the duty of litigants to eliminate and tender such issues as they consider essential to present the merits of the action, before the trial begins; *after* the trial the objection that possible issues were not made comes too late. *Simmons* v. *Mann*, 12.

2 Where no issues are eliminated and submitted to the jury, but the record shows "that the jury find all issues in favor of the plaintiff," the Court will understand it to mean all matters in controversy arising on the pleadings as found for the plaintiffs. *Rogers* v. *Clements*, 81.

3. It is error for the Court to leave a material issue to the jury upon which there is no evidence. *Fortescue* v. *Makeley*, 56.

4. The provisions of *The Code* are mandatory, that the controverted allegations in the pleadings should be submitted to the jury in the shape of issues. *Rudasill* v. *Falls*, 222.

5. The issues arising on the pleadings must be eliminated and submitted to the jury. *Arnold* v. *Estis*, 162.

6. Refusal to submit an issue not raised by the pleadings is not erroneous. *Bell* v. *Hoffman*, 273

7. The requirement of the statute in regard to submitting distinct issues in writing to the jury is mandatory, and where it does not appear from the record what issues were submitted, but it is stated in general terms that all the issues were found in favor of the plaintiff, a new trial will be granted. *Bowen* v. *Whitaker*, 367.

8. Under sec. 395 of *The Code*, if the issues are not prepared by the attorneys, it is the duty of the Judge who tries the case to do so. *Ibid.*

9. Issues which embrace all the substantial matters of defence developed in the pleading and necessary to a determination of the action, are sufficient. *Dupree* v. *Ins. Co.*, 417.

10. Where issues are framed in such a manner that the material facts of the case as found by the jury are confused and unsatisfactory, the verdict should be set aside and a new trial ordered. *Turrentine* v. *The Railroad*, 638.

11. Where part of the issues in an action are decided by a trial, and others, material to the final disposition of the cause, are left open for further adjustment, an appeal is premature, and it will not be entertained. *University* v. *The Bank*, 651.

12. Where issues of fact are raised by the pleadings, it is error for the Judge to decide the action without submitting these issues to a jury, unless both sides consent that he shall decide the whole case, both on the law and the facts. *Wilson* v. *Bynum*, 717.

JOINDER OF ISSUES:

There is no necessity in a prosecution, for the record to show a joinder of issue by the State to the prisoner's plea of not guilty. *State* v. *DeBerry*, 800.

JUDGE'S CHARGE:

1. When requested to do so in apt time, the Judge must put in writing so much of his charge as embodies principles of law, but he cannot be forced to put the recapitulation of the evidence in writing. *Dupree* v. *Ins. Co.*, 417.
2. It is not error in the Judge to omit to charge the jury upon matters of law which can only arise upon the verdict, and have no bearing on the questions to be considered by the jury. *Ibid.*
3. It was not error for the Judge to remind the jury—such being the fact—that there was no evidence before them that the parties who might be called as witnesses, to corroborate the declarations of the plaintiff, were alive at the time of the trial. *Buxly* v. *Buxton*, 479.
4. It is not a violation of the Act of 1796, (*The Code, sec.* 413), for the Judge to tell the jury that the evidence, that the intestate had seen the bond and admitted that he had executed it, if believed by the jury to be true, is entitled to more weight than the opinions of experts as to the genuineness of the signature, and that such opinions should be received with caution. *Ibid.*
5. A charge which is in part erroneous, but which calls the attention of the jury fairly to the material questions on which they are to pass, is no ground for a new trial. *Dills* v. *Hampton*, 565.
6. It is not error in a Judge to refuse to charge abstract principles of law which have no application to the case. *Staton* v *Mullis*, 623.
7. When a witness swears to his possession, with repeated acts of ownership extending over many years, which evidence is allowed to go unchallenged to the jury, it is not improper for the Judge to assume a legal possession to have been testified to and to so present the case in his charge to the jury. *Ibid.*
8. An omission to give an instruction, which might have been proper had it been asked, cannot be assigned as error. *Davis* v. *Council*, 725.
9. An instruction asked after the rendition of the verdict is not in apt time, and may be disregarded. *Ibid.*
10. A Judge is not required to give instructions in the very words in which they are asked, and when the charge to the jury substantially embraces the prayer for instructions, it is no ground for a new trial. *State* v. *Anderson*, 732; *State* v. *McNeill*, 812.

11. It is not error to refuse a prayer for instructions which is not founded on any evidence in the case, and is purely hypothetical. *Ibid.*

12. The Court having charged the jury that every material circumstance must be proved beyond a reasonable doubt and that they must all point to the guilt of the prisoner and exclude every reasonable theory of his innocence, and produce moral certainty of his guilt, it is not *error* to refuse to tell the jury that the circumstances must satisfy them as fully as if direct proof of the act has been produced. *State* v. *Gee*, 756.

13. Where the Judge below is requested to charge that there is no evidence of a fact in issue, the evidence most favorable to the adverse party must be be considered alone, and if it is any evidence at all to establish the fact, the charge must be refused. *State* v. *Horne*, 805.

14. The defendant only has the right to ask for special instructions before the case is given to the jury, but if after the jury have retired, the Court should recall them and instruct them further, the defendant can except if the charge is incorrect. *State* v. *Barbee*, 820.

JUDGMENT:

1. Parties, by consent, may authorize a judgment to be rendered and entered in vacation, but such practice is not to be encouraged. *McDowell* v. *McDowell*, 227.

2. Where such consent is given, and the Judge rendered the judgment, but went out of office before it was entered on the minutes by the clerk, a motion at a subsequent term to enter the judgment *nunc pro tunc* will be allowed. *Ibid.*

3. Where, in a creditor's bill, a claim of one of the creditors, which has been reduced to judgment, is resisted by another creditor on the ground that the cause of action for which the judgment was rendered was barred by the statute of limitations, the judgment having been rendered by a court of competent jurisdiction, is conclusive, and the creditor cannot go behind it. *Moore* v. *Edwards*, 43.

4. An entry on the docket of the Superior Court, showing that a justice's judgment has been duly filed, is *prima facie* evidence that the judgment has been rendered by the justice. *Ibid.*

5. Judgments of justices of the peace regularly docketed in the Superior Court cannot be collaterally impeached. *Ibid.*

6. Except in cases of consent, and where otherwise provided by statute, orders and judgments should be signed in open court. *Branch* v. *Walker*, 87.

7. Where the jury found that the defendant administrator had, in another action in which he was plaintiff, fraudulently suffered a judgment to be entered, by which the estate of his intestate was cheated; *It was held*, that a motion would not be allowed to reinstate said action and set aside fraudulent judgment. *Sherner* v. *Spear*, 148.

8. Courts of justice will not aid a party to a fraudulent transaction to force his confederates in fraud to account. *Ibid.*

9. In proceedings under the statute for ponding water on plaintiff's land, the jury have no right to go back further than one year in assessing damages, but if they do, the error may be corrected by the Court only giving judgment for one year preceding the issuing of the summons. *Goodson* v. *Mullen*, 207.

10. Where, in such proceedings, the annual damages are assessed at less than $20 per annum, the judgment is for five years, including the year preceding the filing of the petition, for each year's damages so assessed, with a *cessat executio* for each year after the first year. *Ibid.*

11. Where the damages were assessed at as much as $20 a year, the judgment was the same, except that the plaintiff had his election to take judgment for five years, or only for the one year preceding the filing of the petition, in which case he was at liberty to bring his action at common law; but if the action was continued for more than five years, the judgment was for the entire amount, and the plaintiff was barred of his election. *Ibid.*

12. Where, in an action for damage to land by ponding water on it, the jury found that the land was damaged eighty dollars per year, and His Honor gave judgment for a sum in gross, and not for each year's damages; *Held*, not to be erroneous. *Ibid.*, 211.

13. A motion in the cause to set aside a judgment for irregularity will be entertained if made in a reasonable time, but this does not imply that every judgment affected in any degree by an irregularity will be set aside. It is only when irregularities are so serious in their nature as to destroy the efficacy of the action and render the judgment void, or when they may seriously prejudice and injure the moving party, that they occasion grounds for setting aside the judgment. *Williamson* v. *Hartman*, 236.

14. What is reasonable time in which the motion must be made, depends upon the circumstances of each case; but when a long period has elapsed and the rights of innocent persons have grown up under judgments, Courts will only set them aside for the most weighty considerations. *Ibid.*

15. So where an infant was duly served with process, and a guardian *ad litem* was appointed, but no process was served on the guardian, nor did he make any defence, and it only appeared inferentially that he knew of the pendency of the action; but it did not appear that the infant had any defence, and adults whose rights were identical with his own, sued in the same action, made no defence; *It was held*, that the judgment was not so irregular that it would be set aside on an application made several years thereafter. *Ibid.*

16. Obtaining a judgment by fraud does not make it irregular, and after the action has been determined, the question of fraud can only be tried in a new action brought to impeach the judgment. Before the action has been determined, a party alleging fraud in any previous interlocutory order, may set up such matter by a petition filed in the cause. *Ibid.*

17. A motion to set aside a judgment for irregularity will be entertained after the determination of the action. *Ibid.*

18. A docketed judgment is no lien on the homestead, and judgment creditors, having no lien, have no right to have the residue, after the sale of the

homestead under a mortgage, secured until after the homestead right elapses. *Utley* v. *Jones*, 261.

19. A judgment by consent cannot be set aside by one of the consenting parties when an execution issued thereon has been satisfied. *Moore* v. *Grant*, 316.

20. After a motion to recall an execution and set aside a judgment has been once heard and refused upon full evidence, it becomes *res adjudicata*. *Ibid.*

21. Where a consent judgment was entered which provided that a writ of possession for certain land was to issue, unless before a specified day referees appointed in the judgment shall ascertain the amount of purchase money due and allot to the defendant the land purchased by him, if the referees fail to act, the remedy is by a motion to modify the judgment by extending the time in which they may act, and not by a motion to set aside the judgment. *Ibid.*

22. A sale by the sheriff relates to the date of the judgment so as to defeat all conveyances and incumbrances upon the land subsequently made, but it has no application to the crops raised on the land after the rendition of the judgment, but before the sale. *Dail* v. *Freeman*, 351.

23. Where an agricultural lien is made by a vendee who has paid only a portion of the purchase money, of which the vendor has notice but makes no objection, his assent to the lien will be presumed. *Ibid.*

24. A parol contract for the purchase of land, is voidable, not void. In such case, a vendee who is in possession is the tenant by sufferance of the vendor. *Ibid.*

25. So, where a tenant makes an agricultural lien, and afterwards the land is sold under execution as the property of the landlord: *It is held*, that the owner of the lien has a right to the crop superior to the purchaser at execution sale. *Ibid.*

26. A judgment creditor has neither *jus in re* nor *jus ad rem* in the judgment debtor's land, but only the right to make his lien effectual by a sale under execution. *Ibid.*

27. A judgment rendered without any complaint having been filed is not necessarily void. Such judgment is valid if rendered by consent, or if ratified by subsequent assent to it. *Stancill* v. *Gay*, 455.

28. An irregular judgment will not be set aside as of course. The moving party must show that the alleged irregularities affect them adversely in a material respect, and that they have exercised due diligence in seeking relief. *Ibid.*

29. A judgment rendered against infant defendants, who have never been served with process, and who have no general or testmentary guardian nor guardian *ad litem*, is void. *Stancill* v. *Gay*, 462.

30. The receipt of money under such judgment by the infants, does not give vitality to the judgment. They may be made to account for the amounts received in another action. *Ibid.*

31. *The Code*, sec. 387, making valid judgments against infants and certain other persons, in cases where, being parties defendant, they are not personally served, does not apply to cases where there has never been any service upon the infant, nor upon any person representing him. *Ibid.*

32. In an action for the recovery of land the defendant denied the allegations of the complaint and pleaded a counter-claim, alleging title to the lands in himself, and asking damages for trespasses done thereon by the plaintiffs. By consent, the case was submitted to arbitrators to decide the matters in issues, *except the question of title*, the award to be a judgment of the Court. The arbitrators awarded damages to the defendant. Upon filing the award, the Court gave judgment against the plaintiffs for the amount found by the arbitrators; *Held*, to be erroneous, as the defendant could have no judgment for damages until the issue as to the title should be determined in his favor. *Wheelbee* v. *Leggett*, 465.

33. A consent judgment cannot be set aside or modified, unless by consent, except for fraud or mutual mistake. *Vaughan* v. *Gooch*, 524.

34. The Court has the power during the term, to correct, modify or recall an unexecuted judgment in either civil or criminal cases. *State* v. *Warren*, 825.

35. But where the Court adjudges that the defendant be fined and imprisoned, and the fine is paid and part of the imprisonment undergone, the Court cannot, even at the same term, recall and suspend the judgment, and at a subsequent term sentence him again for the same offence. *Ibid.*

36. No person can be twice punished for the same offence, and the second judgment under such circumstances is void. *Ibid.*

37. *It seems*, that with the consent of the convict, the Court may sub-divide the term of imprisonment, so that a portion of it may be suffered at one time and the residue at another. *Ibid.*

JUDGMENT LIEN:

1. A docketed judgment is not a lien on the homestead, when rendered on debts which fall under the provisions of the Act of 1876-'77, ch. 253. *Utley* v. *Jones*, 261.

2. A judgment has no lien on land in a county in which it has not been docketed. *Lowdermilk* v. *Corpening*, 333.

3. The lien of a judgment cannot be continued by subrogation when the judgment has been satisfied, nor against a party who acquired rights before the action in which the judgment of subrogation was rendered was begun, nor can such subrogation impair the rights of persons not parties to the action. *Ibid.*

4. A judgment creditor has neither *jus in re* nor *jus ad rem* in the judgment debtor's land, but only the right to make his lien effectual by a sale under execution. *Dail* v. *Freeman*, 351.

5. The rule of the Supreme Court, adopted at June Term, 1869 (Rule XIX, 63 N. C., 669), in so far as it attempted to deprive a senior judgment-creditor of his lien, interferes with a vested right, and is unconstitutional. *Burton* v. *Spiers*, 503.

JUDGMENT *Quando:*

Before the Act of 1846, the lands of a decedent could not be sold to pay a debt upon which a judgment *quando* had been rendered against the administrator; but since the passage of this act, which makes the proceeds of land, when sold, assets in the hands of the personal representative for the payment of debts, a judgment *quando* may be satisfied from the proceeds of the sale of the decedent's lands. *Wilson* v. *Bynum*, 717.

JUDICIAL SALE:

1, In a sale of land by order of Court, the Court has the power to re-open the biddings, and order the land to be sold a second, and possibly a third time for extraordinary causes, but the power should be exercised with caution. *Hinson* v. *Adrian*, 121.

2. Where an interlocutory order, made by consent, directs the judicial sale of land, the parties to the action cannot change the terms of the order by consent, in a manner detrimental to the interest of the purchaser at such sale. *Vaughan* v. *Gooch*, 524.

3. A consent order directed a sale of certain lands by a commissioner, that said commissioner execute a deed to the purchaser, and further directed him how to apply the proceeds of the sale, but contained no provision for re-opening the biddings. After the sale, an advance of ten per cent. on the amount bid; *Held*, that the refusal by the Superior court to open the biddings was proper. *Ibid.*

4. It is a well settled rule of practice in this State, that in judicial sales, the biddings will be opened and a re-sale ordered, if, before the sale is confirmed, an advance of ten per cent. is offered. After confirmation the biddings will not be re-opened, except in case of fraud or unfairness, or some other adequate cause. *Trull* v. *Rice*, 572.

5. Where, however, the Judge below, in the exercise of his discretion refuses to open the biddings on an advance of ten per cent. before the sale is confirmed, the Supreme Court will not direct him to do so. *Ibid.*

6. In an application to set aside a sale and re-open the biddings, the Supreme Court will not look into conflicting affidavits, but are governed by the facts as found by the Judge. *Ibid.*

JURISDICTION OF THE CLERK:

1. The clerk has no jurisdiction, as clerk, of a motion to dismiss a special proceeding. The Superior Court has jurisdiction, and the clerk has authority to do certain things about it, which stand as the action of the court, unless either party excepts and appeals to the judge. *Strayhorn* v. *Blaylock*, 292.

2. On such appeals it is error to remand the cause to the clerk with directions. The Court ought to have reversed the order of the clerk, and the clerk, having entered the judgment, ought to have proceeded according to law. *Ibid.* And same principle, *Harper* v. *Harper*, 300.

3. In special proceedings before the clerk, when issues of fact are joined, they must be certified to the court in term for trial. As soon as such issues are tried, it is the province of the clerk, and not of the judge, to make orders in the cause. *Wharton* v. *Wilkerson*, 407.

4. Where, in such proceedings, the record does not disclose that issues of fact have been transferred to the court in term, any orders made by the Judge are extra-judicial. *Ibid.*

5. A claim for contribution cannot be set up by one defendant against another in a proceeding to sell land for assets. When the amount exceeds two hundred dollars, the court in term alone has jurisdiction of such cause of action, except in cases of contribution between persons claiming as devisees under a will, or as heirs-at-law of a testator to whom undevised land has descended, which exception is caused by section 1534 of *The Code*. *Ibid.*

6. The former courts of probate had exclusive jurisdiction of proceedings to settle the estates of deceased persons. *Stancill* v. *Gay*, 455.

7. Where, under the provisions of a Special Act, the clerk was directed to order the sheriff to summon commissioners to assess damages, the clerk has no jurisdiction to appoint such commissioners himself. *Railroad Co.* v. *Warren*, 620.

8. Where it is necessary, and the administrator fails to take the proper steps to sell his intestate's real estate for assets, he may be compelled by the clerk to do so, or a creditor may file a creditor's bill in the Superior Court against the administrator or executor, and the heirs-at-law or devisees, for the sale of the land. *Wilson* v. *Bynum*, 717.

9. *The Code* has not taken away from the Superior Court any jurisdiction heretofore exercised by courts of equity, except, perhaps, in cases exclusively within the jurisdiction of a justice of the peace. *Ibid.*

JURISDICTION OF JUSTICES OF THE PEACE:

1. Justices of the peace have no jurisdiction when the cause of action is an equitable right. *Hunter* v. *Yarborough*, 68.

2. A justice of the peace has no jurisdiction of an action in *tort* when the damages demanded exceed $50. *Barneycastle* v. *Walker*, 198.

3. A justice of the peace has jurisdiction of an action to recover taxes alleged to have been wrongfully paid where the amount is less than $200. *Burbank* v. *Commissioners*, 257.

JURISDICTION OF THE SUPERIOR COURTS:

1. The equitable jurisdiction of the Superior Courts over dower has not been taken away by the jurisdiction conferred on the clerk in such matters, but in order for the jurisdiction to attach, as a general rule, some equitable element should appear in the application. *Pollard* v. *Slaughter*, 72.

2. The Superior Court has no jurisdiction of an action to recover taxes alleged to have been wrongfully paid, when the amount is less than $200. *Burbank* v. *The Commissioners*, 257.

3. The Clerk has no jurisdiction, as clerk, of a motion to dismiss a special proceeding. The Superior Court has jurisdiction, and the clerk has authority to do certain things about it, which stand as the action of the Court, unless either party excepts and appeals to the Judge. *Strayhorn* v. *Blaylock*, 292.

4. On such appeals it is error to remand the cause to the clerk with directions. The Court ought to have reversed the order of the clerk, and the clerk, having entered the judgment, ought to have proceeded according to law. *Ibid.*

5. And same principle, *Harper* v. *Harper*, 300.

6. The jurisdiction of the Superior Court in appeals from a justice of the peace, is entirely derivative, and if the justice had no jurisdiction of the action, the Superior Court can derive none from amendment or *remittitur*. *Ijames* v. *McClamroch*, 362.

7. The Judge during term has jurisdiction to appoint a receiver, in a supplemental proceeding pending before him on appeal from a ruling of the clerk. *Coates* v. *Wilkes*, 376.

7. In special proceedings before the clerk, when issues of fact are joined, they must be certified to the court in term for trial. As soon as such issues are tried, it is the province of the clerk, and not of the judge, to make orders in the cause. *Wharton* v. *Wilkerson*, 407.

8. Where, in such proceedings, the record does not disclose that issues of fact have been transferred to the court in term, any orders made by the Judge are extra-judicial. *Ibid.*

9. A claim for contribution cannot be set up by one defendant against another in a proceeding to sell land for assets. When the amount exceeds two hundred dollars, the court in term alone has jurisdiction of such cause of action, except in cases of contribution between persons claiming as devisees under a will, or as heirs-at-law of a testator to whom undevised land has descended, which exception is caused by section 1534 of *The Code*. *Ibid.*

10. The former courts of probate had exclusive jurisdiction of proceedings to settle the estates of deceased persons. *Stancill* v. *Gay*, 455.

11. Where it is necessary, and the administrator fails to take the proper steps to sell his intestate's lands for assets, a creditor may file a creditor's bill in the Superior Court against the administrator or executor, and the heirs-at-law or devisees, for the sale of the land. *Wilson* v. *Bynum*, 717.

12. The Code has not taken away from the Superior Court any jurisdiction heretofore exercised by courts of equity, except, perhaps, in cases exclusively within the jurisdiction of a justice of the peace. *Ibid.*

JURISDICTION OF THE SUPREME COURT:

1. This Court cannot review the findings of fact of the court below on a motion under section 274 of The Code. *Branch* v. *Walker*, 87.

2. In applications for receivers and injunctions in supplemental proceedings, the Supreme Court will examine the evidence and pass upon the facts. *Coates* v. *Wilkes*, 376.

3. In actions *purely equitable*, the Supreme Court has jurisdiction to pass on the *questions of fact* as distinguished from the *issues of fact*, where the evidence on which the Judge below acted accompanies the record and can be examined by the appellate court. *Ibid.*

4. *Quære*, whether the Supreme Court can review the findings of fact made by the Judge below, in an action against an executor for an account and settlement of the estate of his testator. *Depriest* v. *Patterson*, 399.

5. Where the Supreme Court cannot pass upon the facts, it cannot look into the evidence upon which the referee bases his findings of fact, unless the exception is that he has found facts with no evidence to support them. *Barbee* v. *Green*, 471.

6. The Supreme Court can review on appeal what is mistake, surprise or excusable neglect under section 274 of *The Code*, but it cannot review the discretion exercised by a Judge of the Superior Court under that section. *Foley* v. *Blank*, 476.

7. When the transcript does not show that any court was held, or that any Judge was present, or gave judgment, it is so defective that the Supreme Court has no jurisdiction to act upon it. *Broadfoot* v. *McKethan*, 561.

8. In an application to set aside the sale and open the biddings, the Supreme Court will not look into conflicting affidavits, but will be governed by the facts as found by the Court below. *Trull* v. *Rice*, 572.

JURY:

1. A party's reason for peremptorily challenging a juror cannot be inquired into. The law gives to a litigant the right to object to a limited number of jurors without assigning any cause. *Dupree* v. *Ins. Co.*, 417.

2. A juror summoned on a special *venire* is not rendered incompetent because he has served on the jury in the same court within two years. Only tales-jurors come within the *proviso* of section 1733 of *The Code*, and in order that they may be disqualified, it must appear that they have not only been summoned, but have acted as jurors within that time. *State* v. *Whitfield*, 831.

JURY TRIAL:

1. It is doubtful if parties can agree that a jury trial may be had on exceptions to a referee's report when the reference is by consent. *Harris* v. *Shaffer*, 30.

2. If, in such case, the right to trial by jury can be demanded at all, it must be done when the exceptions are filed. *Ibid.*

3. Where issues of fact are raised by the pleadings, it is error for the Judge to decide the action without submitting these issues to a jury, unless both sides consent that he shall decide the whole case, both on the law and the facts. *Wilson* v. *Bynum*, 717.

JUSTICE'S JUDGMENTS:

1. An entry on the docket of the Superior Court, showing that a transcript of a justice's judgment has been filed, is *prima facie* evidence that the judg-

ment has been rendered by the justice. The fact of docketing the judgment is *prima facie* evidence of its existence. *Moore* v. *Edwards*, 43.

2. Judgments of justices of the peace regularly docketed in the Superior Court, cannot be collaterally impeached. *Ibid.*

3. Appeals cannot be taken from justices of the peace to the Superior Courts from interlocutory judgments; therefore, where a justice dismissed a warrant of attachment, and the plaintiff appealed to the Superior Court, which court dismissed the plaintiff's action on the ground that no service of process had ever been made; *Held*, erroneous, as no appeal lay from the order of the justice, and the Superior Court should only have dismissed the appeal. *Phelps* v. *Worthington*, 270.

LANDLORD AND TENANT:

1. A tenant cannot contest his landlord's title until he has given up the possession of the land. *James* v. *Russell*, 194.

2. When A leases land to B for some determinate time, it gives B a right of entry which is called his interest in the term; but after actual entry, the estate vests in him, as if by grant, and he is in possession, not properly of the land, but of the term. *Barneycastle* v. *Walker*, 198.

3. If the lessor enters and dispossesses his lessee after he has entered upon and taken possession of his term, his remedy is by action *ex delicto;* under the former practice, an action of trespass *quare clausum fregit*, but under the present system an action for a *tort*. *Ibid.*

4. There is no implied contract that the lessor will not molest the lessee, but there is an implied condition, upon a breach of which the lessee is discharged from his obligation to pay rent. *Ibid.*

5. A justice of the peace has no jurisdiction of such an action when the damages demanded exceed $50. *Ibid.*

6. A tenant can bring trespass against his landlord for forcibly entering and breaking his close, during the term. *Ibid.*

7. A parol contract for the purchase of land, is voidable, not void. In such case, a vendee who is in possession is the tenant by sufferance of the vendor. *Dail* v. *Freeman*, 351.

8. One who enters as a licenser is estopped to deny the title of his licensee, and when the license is given by a tenant, the licenser is estopped to deny the title of his licensee's landlord. *Dills* v. *Hampton*, 565.

9. Any act done by a tenant which works a permanent injury to the free-hold is waste. *Ibid.*

10. *The Code*, §1062, which makes an injury to a house indictable, does not embrace the case of injury to a building by a lessee during the continuance of his term. *State* v. *Whitener*, 798.

LAWS OF OTHER STATES:

The statute law of another State is a fact to be shown by evidence, and cannot be noticed judicially. *Hilliard* v. *Outlaw*, 286.

LEASE:

1. When A leases land to B for some determinate time, it gives B a right of entry which is called his interest in the term; but after actual entry, the estate vests in him, as if by grant, and he is in possession, not properly of the land, but of the term. *Barneycastle* v. *Walker*, 198.
2. If the lessor enters and dispossesses his lessee after he has entered upon and taken possession of his term, his remedy is by action *ex delicto;* under the former practice, an action of trespass *quare clausum fregit*, but under the present system an action for a *tort*. *Ibid.*
3. There is no implied contract that the lessor will not molest the lessee, but there is an implied condition, upon a breach of which the lessee is discharged from his obligation to pay rent. *Ibid.*
4. A justice of the peace has no jurisdiction of such an action when the damages demanded exceed $50. *Ibid.*
5. A tenant can bring trespass against the landlord for forcibly entering and breaking his close, during the term. *Ibid.*

LEGACY:

1. Where a testator leaves two-thirds of his estate to a legatee for life, the value of such legacy is the value of a life-estate in two-thirds of the net amount of the estate, two years next after the qualification of the executor under the will. *Grant* v. *Edwards*, 447.
2. Where a legatee, who is also executor, misapplies any of his testator's estate, it must be deducted from his legacy. *Ibid.*
3. Where a testator give to a legatee an estate for life in two-thirds of his estate, but nothing is paid to him, he is not entitled to interest on the amounts which should have been paid him each year. *Ibid.*
4. Where a legacy is left to an executor in payment of a debt due the executor by the testator, if the executor prove the will, the legacy is a payment in full of the debt, although it prove to be of less value. *Syme* v. *Badger*, 706.

LICENSE:

1. Where the defendant, as overseer of a road, entered on and took possession of a piece of land belonging to the plaintiff for the purposes of the road, under a license from the tenant of the plaintiff; *Held*, that he was liable in damages in an action by the owner of the fee. *Dills* v. *Hampton*, 565.
2. A license from one who has no right to give it cannot justify an illegal act. *Ibid.*
3. One who enters as a licenser is estopped to deny the title of his licensee, and when the license is given by a tenant, the licenser is estopped to deny the title of his licensee's landlord. *Ibid.*

LIFE-ESTATE:

1. Where a testator devised two-thirds of his entire estate to a party for life it means two-thirds of his net estate, and it takes effect, in the absence of

any express provisions to the contrary in the will, immediately after the time when the law requires the executor to distribute the estate, unless the estate should be sooner settled. *Grant* v. *Edwards*, 442.

2. Where a testator gives to a legatee an estate for life in two-thirds of his estate, but nothing is paid to him, he is not entitled to interest on the amounts which should have been paid him each year. *Grant* v. *Edwards*, 447.

3. A deed conveying a life-estate is color of title, and when accompanied by adverse possession for the required time, will ripen into a good title to the life-estate so granted. *Staton* v. *Mullis*, 623.

4. When the plaintiff claims under a deed purporting to convey the land in dispute, and shows an apparently adverse possession, the burden of proof is on the defendant to show that such possession is not adverse; and when he claims a reversionary estate after a life-estate, that such life-estate determined too short a time before the bringing of the action to bar his right. *Ibid.*

5. A deed is an estoppel, even as between the parties thereto, only as to the estate conveyed. *Ibid.*

6. Where A, having a life-estate, conveys to B in fee, who conveys to C, the reversioner or remainderman does not have a right of action until the death of the life-tenant. At his death, the possession becomes adverse, and will ripen into a good title by seven years possession, the title being out of the State. *Ibid.*

7. Where a sale for partition is made among tenants-in-common, one of whom is entitled to a life interest only, the tenant for life must have the interest on the value of the share to which he is entitled paid to him for his life, and he is not entitled to have the value of his life-estate ascertained, and a sum in gross paid to him therefor. *Winstead, ex-parte*, 703.

8. By section 1909 of *The Code*, in a sale for partition of land subject to dower, where the widow is a party, her life-estate may be valued in money, and the money paid to her in lieu of the interest for life on one third of the proceeds of sale. *Ibid.*

LOCAL ASSESSMENTS:

1. Special burdens imposed for local improvements by the Legislature are not unconstitutional. They are considered not so much a burden, as a compensation for the enhanced value which the taxed property is supposed to derive from the work. *Commissioners of Greene* v. *Commissioners of Lenoir*, 180.

2. Where an act imposing a local assessment provided that the commissioners should levy a special tax on all the real estate in a certain district which was taxable by the State and county, it does not embrace real estate owned by schools and railroads which was not taxable for general purposes. *Bradshaw* v. *Commissioners*, 278.

3. *Quære?* Whether it is necessary for the justices of the peace to act with the commissioners in levying the taxes for the local improvements under these acts; but if so, in this case, it may be obviated when the tax is to be readjusted, when the justices and commissioners may act in concert. *Ibid.*

MANSLAUGHTER:

1. The doctrine of cooling time only applies when there has been legal provocation. *State* v. *McNeill*, 812.

2. No words, however insulting, and no actions or gestures expressive of contempt, unaccompanied by indignity to the person, by a battery, or at least an assault, amount to a legal provocation so as to mitigate a slaying from murder to manslaughter. *Ibid.*

3. Where a violent altercation in words had taken place between the prisoner and the deceased, and, after being separated for between five and ten minutes, they again come together, and, after angry and insulting words pass between them, prisoner shoots the deceased, the killing is murder and not manslaughter. *Ibid.*

4. The *general* rule is that evidence of the general reputation of the deceased as a violent and dangerous man is not admissible; to this rule there is a well defined exception that such evidence is admissible, when there is evidence tending to show that the killing may have been done in self-defence, or when the evidence is wholly circumstantial and the character of the transaction is in doubt. Wherefore there was no error in allowing the jury to consider the evidence in determining whether the prisoner acted in self-defence, but not on the question of manslaughter. *Ibid.*

MARRIAGE:

Where a father, in view of the intended marriage of his daughter makes a deed to her and her intended husband for a tract of land, as an inducement to the marriage; *Held*, a valuable consideration. *Arnold* v. *Estis*, 162.

MECHANIC'S LIEN:

1. Certain property was conveyed to trustees to receive the profits and pay them over to the *cestui que trust*, beyond the necessary expenses incident thereto. The trustees contracted a debt for repairs, and the creditor filed a mechanic's lien on the property; *Held*, that the trustees had the power, under the provisions of the deed, to make a contract on the credit of the trust property for necessary repairs. *Cheatham* v. *Rowland*, 340.

2. *Held, further*, that it was error in the court below to refuse a judgment to enforce the lien by a sale of the property, until the *cestui que trust* were made parties defendant, and were given an opportunity to be heard. *Ibid.*

MORTGAGE:

1. A mortgagee is the legal owner of the mortgaged land, and entitled to the notice of a levy and sale for taxes. *Hill* v. *Nicholson*, 24.

2. Where a mortgagor brings an action to restrain the mortgagee from selling the mortgaged property, on the ground that the debt secured is usurious, an injunction will be refused, if the mortgagee waives the usurious parts of the contract. *Manning* v. *Elliott*, 48.

3. Where a debtor comes into a court of equity, and asks relief against an usurious contract, he must pay the defendant the money justly due him, with lawful interest thereon. This rule, however, does not apply when a creditor comes into court asking the enforcement of a usurious claim. *Ibid.*

4. Where an action is brought to enjoin a sale under a power of sale contained in a mortgage, the court having acquired jurisdiction of the parties and the sub-matter, may direct a sale of the land; and is not bound to direct such sale in strict accordance with the terms contained in the deed. *Ibid.*

5. Where in such case a mortgage provided, that the mortgagee should have the right to advertise at once upon failure to pay the amount due, the court properly allowed the mortgagor sixty days within which to pay the debt, before advertisement for sale. *Ibid.*

6. In the absence of express stipulations in the mortgage, a mortgagor is not entitled to notice of the intention of the mortgagee to foreclose. *Ibid.*

7. A mortgage given to secure an annuity provided that in case the annuity was not promptly paid, the annuitant might sell the mortgaged land, and after paying the overdue instalments, might either re-invest the money or might estimate the cash value of her annuity at the day of sale, and retain the amount out of the proceeds. The annuity was in arrears, and a suit was brought by a second mortgagee to foreclose. The annuitant elected to take the cash value of her annuity, but died pending the action to foreclose; *Held*, that her administrator was only entitled to the unpaid arrears of the annuity and interest thereon. *Moore* v. *Dunn*, 63.

8. The rule that the personal estate must be used in discharging debts secured upon real estate, in order to its exoneration, operates among persons who derive their interest directly from the deceased owner, and does not extend to creditors secured by mortgage. These must first exhaust the appropriated land, and look to the personalty only for the residue. *Ibid.*

9. If a mortgagee has a settlement with a mortgagor and takes a new note for the balance due, with a new mortgage to secure it on the same property, and after the execution of the first, but before the execution of the second mortgage, the mortgagor sells and delivers the property mortgaged; *Held*, that by the settlement and taking of the new note and mortgage, the prior mortgage was discharged. *Smith* v. *Bynum*, 108.

10. Where, in an action brought by mortgagees and judgment creditors to have the mortgaged property sold for the payment of the mortgages and judgments, a sale is made without objection by the debtor, it is too late for the debtor to ask for a homestead by metes and bounds after such sale has been made. His homestead can be paid to him in money. *Hinson* v. *Adrian*, 121.

11. A mortgagor is entitled to a homestead in an equity of redemption, and if the land is certainly of greater value than the mortgage debt, the homestead may be assigned by metes and bounds, but if by doing so the value of the homestead would be impaired, it is competent to order a sale, and assign a homestead in the money arising therefrom. *Ibid.*

12. A stipulation in a mortgage that the mortgagee should retain, from the proceeds of the sale of the property, "costs and charges, including a commission of five per cent. for making such sale," in addition to the principal and interest then due on the secured debt, is not usurious, in the absence of proof of an usurious intent. It is a provision for the compensation for services performed in the execution of the trust, and not a part of the consideration for the loan. *Howell* v. *Pool*, 450.

13. Such stipulations are not approved, and will never be enforced when the mortgagee makes the sale and becomes the purchaser. *Ibid.*

14. A sale to a mortgagee by himself, under a power of sale in the mortgage deed, is ineffectual to divest the equity of redemption from the mortgagor, and the relation of the parties is not changed by that act. *Ibid.*

15. The plaintiff executed to the defendant a mortgage to secure the amount due upon a note one year thereafter; before the day of payment she purchased two notes on defendant (who was insolvent), past due, and demanded a credit for the sums due thereon upon her note; the defendant refused to allow the credits alleging that he had sold the note before it became due, and advertised the mortgaged premises for sale; *Held*, that the plaintiff was entitled to have the sale enjoined until the issues arising upon the controverted facts were properly tried. *Harrison* v. *Bray*, 488.

16. In an action to foreclose a mortgage, the defendants in their answer admitted the execution of the note and mortgage, and the amount due thereon, but alleged as a defence, 1st. That the land had been sold under judgments docketed prior to the execution of the mortgage, and that they had acquired a life-estate in the land from the purchaser at execution sale. 2d. That the defendants own no other real estate from which they can get a homestead; and, 3d. That when the mortgage was executed, they delivered to the mortgagee other securities as additional security for the debt; *Held*, that the answer raises no material issue, either of law or fact, and is frivolous. *Weil* v. *Uzzell*, 515.

17. *Held further*, that the mortgagors will not be estopped by the decree of foreclosure from setting up the title acquired by them from the purchaser at the execution sale, in an action against them for the possession of the land by a purchaser at a sale by the mortgagee. *Ibid.*

18. *It seems* that under some circumstances a mortgagee may be required to sell a part of the mortgaged land sufficient to satisfy his debt, in order that the mortgagor may have a homestead allotted in the residue. *Ibid.*

19. While courts permit the use of powers of sale in mortgages, they regard them with much suspicion and watchfulness, and will enjoin their execution when an attempt is made to use them for the purpose of oppressing or obtaining an unfair advantage over the mortgagor. *Gooch* v. *Vaughan*, 610.

20. Where it appears in an application to enjoin a mortgagee from selling the mortgaged property under the power of sale, that there are many and complicated accounts between the mortgagor and mortgagee, and the balance due is uncertain, the Court will restrain the execution of the power of sale until an account can be stated and the amount due ascertained. *Ibid.*

21. In such case, the rule which requires a mortgagee, in certain cases, to pay the amount admitted to be due before the injunction will be granted, does not apply, because no definite sum is known to be due. *Ibid.*

22. A mortgagee with power of sale is a trustee, 1st, to control the property and apply the proceeds to the debt; 2nd, to account for any surplus to the mortgagor; and he is held to a strict account. *Ibid.*

23. Where a vessel which was duly enrolled in the custom house in accordance with the act of Congress, but which was entirely used on North Carolina waters, was mortgaged, which mortgage was enrolled in the custom house in accordance with the act of Congress, but was not registered as required by the North Carolina registration acts; *It was held*, that such enrolment was a valid lien on the vessel. *Lawrence* v. *Hodges*, 672.

24. Such mortgage can be proven for enrolment before a clerk of the Superior Court, as he is *ex officio* a notary public. *Ibid.*

MOTION:

1. A notice of a motion to set aside a judgment may be properly served on the attorney of record of the opposing party. *Branch* v. *Walker*, 87.

2. Where the jury found that the defendant administrator had, in another action in which he was plaintiff, fraudulently suffered a judgment to be entered, by which the estate of his intestate was cheated; *It was held*, that a motion would not be allowed to reinstate said action and set aside fraudulent judgment. *Sherner* v. *Spear*, 148.

3. Courts of justice will not aid a party to a fraudulent transaction to force his confederates in fraud to account. *Ibid.*

4. A motion in the cause to set aside a judgment for irregularity will be entertained if made in a reasonable time. *Williamson* v. *Hartman*, 236.

5. What is reasonable time in which the motion must be made, depends upon the circumstances of each case; but when a long period has elapsed and the rights of innocent persons have grown up under judgments, Courts will only set them aside for the most weighty considerations. *Ibid.*

6. Obtaining a judgment by fraud does not make it irregular, and after the action has been determined, the question of fraud can only be tried in a new action brought to impeach the judgment. Before the action has been determined, a party alleging fraud in any previous interlocutory order, may set up such matter by a petition filed in the cause. *Ibid.*

7. A motion to set aside a judgment for irregularity will be entertained after the determination of the action. *Ibid.*

8. A demurrer "1st, that the complaint does not set forth a cause of action against the defendant, 2nd, that the Court has no jurisdiction of the matter as set forth," will be disregarded as a pleading, but a motion to dismiss for these grounds will be sustained. *Burbank* v. *Commissioners*, 257.

9. After a motion to recall an execution and set aside a judgment has been once heard and refused upon full evidence, it becomes *res adjudicata*. *Moore* v. *Grant*, 316.

10. Where a consent judgment was entered which provided that a writ of possession for certain land was to issue, unless before a specified day referees appointed in the judgment shall ascertain the amount of purchase money due and allot to the defendant the land purchased by him, if the referees fail to act, the remedy is by a motion to modify the judgment by extending the time in which they may act, and not by a motion to set aside the judgment. *Ibid.*

11. Before the Act of 1879, ch. 68, (*The Code*, §884), a civil action and not a summary proceeding in the cause, was the proper remedy against the sureties to an undertaking to stay execution on an appeal from the judgment of a justice of the peace. *McMinn* v. *Patton*, 371.

12. Where an interlocutory consent judgment is attacked for fraud or mistake, it must be done by a motion in the case: A final judgment by a new action. *Vaughan* v. *Gooch*, 524.

MOTIVE:

It is never necessary to show a motive for the commission of a crime in order for a conviction. But when the prosecution relies upon circumstantial evidence, it is always competent to introduce evidence tending to prove a motive. *State* v. *Green*, 779.

MUNICIPAL CORPORATION:

1. A municipal corporation, which has the right under its charter to perform certain work, is not liable for any damages which may accrue to an individual from doing the work, provided it is done with ordinary skill and caution. *Wright* v. *Wilmington*, 156.

2. A municipal corporation, in preparing side drains to its streets for carrying off rain water, is not required to provide against such extraordinary and excessive rains as could not be reasonably foreseen. So, when the plaintiffs sued for damages for flooding their cellar, caused by the gutters not being of sufficient capacity to carry off the water, and it appeared that they had for five years been sufficient, and only failed on this one occasion, it was error in the Court below not to submit this view of the case to the jury. *Ibid.*

3. Where a municipal corporation is indebted to a taxpayer, the latter is not entitled either in law or equity to have the amount due him applied as a set-off or counter-claim against the amount he owes for taxes. *Gatling* v. *Commissioners*, 536.

MURDER:

1. It is unnecessary to aver, in an indictment, any matter which need not be proved. So where an indictment for murder did not set out that "the prisoner, not having the fear of God before his eyes, but being moved and seduced by the devil," and also did not set out that the "deceased was in the peace of God and the State;" *It was held*, no ground to arrest the judgment. *State* v. *Howard*, 772.

2. Where an indictment for murder sets out the infliction of a mortal wound, and that the deceased "then and there instantly died," it is a sufficient averment that the deceased died within a year and a day from the time of the infliction of the wound. *Ibid.*

3. The doctrine of cooling time only applies when there has been legal provocation. *State* v. *McNeill*, 812.

4. No words, however insulting, and no actions or gestures expressive of contempt, unaccompanied by indignity to the person, by a battery, or at least an assault, amount to a legal provocation so as to mitigate a slaying from murder to manslaughter. *Ibid.*

5. Where a violent altercation in words had taken place between the prisoner and the deceased, and, after being separated for between five and ten minutes, they again come together, and, after angry and insulting words pass between them, prisoner shoots the deceased, the killing is murder and not manslaughter. *Ibid.*

6. The *general* rule is that evidence of the general reputation of the deceased as a violent and dangerous man is not admissible; to this rule there is a well defined exception that such evidence is admissible, when there is evidence tending to show that the killing may have been done in self-defence, or when the evidence is wholly circumstantial and the character of the transaction is in doubt. Wherefore there was no error in allowing the jury to consider the evidence in determining whether the prisoner acted in self-defence, but not on the question of manslaughter. *Ibid.*

MUTUAL COVENANTS:

Where a contract contains mutual and dependent covenants, specific performance cannot be decreed, unless the party seeking it alleges either that he has performed or is ready and willing to perform his part of the contract. *Wilson* v. *Lineberger*, 547; *Ducker* v. *Cochrane*, 597.

NAVIGATION LAWS:

1. The power conferred upon Congress by the Constitution to regulate commerce with foreign nations and between the States, is paramount and exclusive, and includes the power to regulate navigation by all manner of vessels upon navigable waters flowing from one State into another, or from a State into the sea, and extends to giving to Congress the power to prescribe the methods of sale and transfer of such vessels. *Lawrence* v. *Hodges*, 672.

2. Enrolment under the act of Congress, and not the kind of service in which they are engaged, gives to vessels their national character, and renders them subject to the laws of the United States. *Ibid.*

3. Where a vessel which was duly enrolled under the act of Congress, but which was entirely used in North Carolina waters, was mortgaged, which mortgage was registered in the custom house in accordance with the act of Congress, but was not registered as required by the North Carolina registration acts; *It was held*, that such registration was valid. *Ibid.*

4. It is not necessary that a vessel used entirely on the waters of this State should be enrolled as required by the act of Congress, although it may be done, if the owner desires. *Ibid.*

5. Such mortgage can be proven before a clerk of the Superior Court, as he is *ex-officio* a notary public. *Ibid.*

NEGLIGENCE:

1. Where the owners of a steamboat provided a passage way which was exposed to escaping steam, and a passenger was injured in consequence by the escaping steam; *Held*, that the owners were liable. *Gruber* v. *R. R. Co.*, 1.

2. A municipal corporation, which has the right under its charter to perform certain work, is not liable for any damages which may accrue to an individual from doing the work, provided it is done with ordinary skill and caution. *Wright* v. *Wilmington*, 156.

3. A municipal corporation, in preparing side drains to its streets for carrying off rain water, is not required to provide against such extraordinary and excessive rains as could not be reasonably foreseen. So, when the plaintiffs sued for damages for flooding their cellar, caused by the gutters not being of sufficient capacity to carry off the water, and it appeared that they had for five years been sufficient, and only failed on this one occasion, it was error in the court below not to submit this view of the case to the jury. *Ibid.*

4. Railroad companies are held to a high degree of responsibility in providing for the safety of passengers. But from the nature of their business, it is attended with some danger, and when they make it as safe as it practically can be made, they are not liable for an injury which results to a passenger from his own lack of caution. *Potter* v. *R. R. Co.*, 541.

5. Where a passenger—a child of nine years of age—fell and broke her arm over the iron rail of the track of a railroad company, which was close to the defendant's, at its depot where it was accustomed to receive and discharge passengers, no negligence being shown in the manner in which the rails were arranged, the defendant was not liable. *Ibid.*

6. *Quære*, Whether the defendant could be held responsible for defects existing in the track of another railroad. *Ibid.*

7. In an action against a railroad company for an injury to the plaintiff, resulting from its negligence, although the plaintiff shows negligence on the part of the defendant, he cannot recover, if by reasonable care and attention on his part, he could have avoided the jury. *Turrentine* v. *The Railroad*, 638.

8. Mere negligence or want of ordinary care will not, however, bar the plaintiff's recovery, unless it is such that but for that negligence the misfortune would not have happened; nor if the defendant might by the exercise of care on his part, have avoided the consequence of the plaintiff's negligence. *Ibid.*

NEGLIGENCE OF COUNSEL:

1. *It seems*, that any neglect by an attorney of his duties as counsel, will entitle a party to relief. *Winborn* v. *Byrd*, 7.
2. It is not the duty of an attorney to file the appeal bond. *Ibid.*
3. Negligence or ignorance of counsel in filing an appeal bond is no ground for a *certiorari*. *Turner* v. *Quinn*, 501.

NEWLY DISCOVERED EVIDENCE:

The Supreme Court will grant a new trial for newly discovered evidence, where it is clear that substantial justice has not been done upon the trial below because of unavoidable failure to produce the evidence, but it will never be granted when the newly discovered evidence is cumulative or corroborative of evidence offered on the former trial. *Simmons* v. *Mann*, 12.

NEW TRIAL:

1. A new trial on the ground of excessive damages is exclusively in the discretion of the Superior Court and is not the subject of review. *Goodson* v. *Mullen*, 211.
2. The Supreme Court will grant a new trial for newly discovered evidence, where it is clear that substantial injustice has been done upon the trial below because of unavoidable failure to produce the evidence there, and where it is probable another trial will enable the right to prevail; but it will never be granted where the newly discovered evidence is merely cumulative or corroborative of the testimony offered on the former trial. *Simmons* v. *Mann*, 12.
3. When a new trial is awarded by the Supreme Court on appeal, the case goes back to the Superior Court for a new trial on the whole merits, and the Court below ought to proceed with the trial, as if no former trial had taken place. It is immaterial that the evidence is the same as that used on the former trial. *McMillan* v. *Baker*, 110.
4. Where, in deference to the opinion of the Judge, a plaintiff submits to a non-suit and appeals, the non-suit will be set aside and a new trial ordered, if in any view of the evidence offered the plaintiff has made out a *prima facie* case. *Abernathy* v. *Stowe*, 213.
5. A charge which is in part erroneous, but which calls the attention of the jury fairly to the material questions on which they are to pass, is no ground for a new trial. *Dills* v. *Hampton*, 565.
6. Where issues are framed in such a manner that the material facts of the case as found by the jury are confused and unsatisfactory, the verdict should be set aside and a new trial ordered. *Turrentine* v. *The Railroad*, 638.
7. A Judge is not required to give instructions in the very words in which they are asked, and when the charge to the jury substantially embraces the prayer for instructions, it is no ground for a new trial. *State* v. *Anderson*, 732.
8. When a witness was not sworn, but the fact was not discovered until after the jury had retired; *It was held*, not to entitle the accused to a new trial.

The correction of such omissions is left to the discretion of the Judge, and his refusal cannot be assigned for error. *State* v. *Gee*, 756.

NON-SUIT:

1. Where, in deference to the opinion of the Judge, a plaintiff submits to a non-suit and appeals, the non-suit will be set aside and a new trial ordered, if in any view of the evidence offered the plaintiff has made out a *prima facie* case. *Abernathy* v. *Stowe*, 213.
2. Where it appears in the record that the plaintiff took a non-suit and appealed before the issues arising on a counter-claim pleaded by the defendant had been disposed of, but no objection was made by the defendant at the time; *Held*, not to be such an exception as can be taken for the first time in this Court. *Harper* v. *Dail*, 394.
3. When the defendant pleads, as a counter-claim, a cause of action arising out of the contract or transactions set forth in the complaint as the foundation of the plaintiff's cause of action, the plaintiff cannot be permitted to take a non-suit. But when the counter-claim does not arise out of the same transactions as the plaintiff's cause of action, but falls under subdivision 2 of section 244 of The Code, the plaintiff may submit to a non-suit. In such case, the defendant may either withdraw his counter-claim, when the action will be at an end, or he may proceed to try it, at his election *Whedbee* v. *Leggett*, 469.

NOTICE:

1. Neither parties nor counsel are required to take notice of orders made after the Judge has left the court-house for the term. *Branch* v. *Walker*, 87.
2. A notice of a motion to set aside a judgment may be served on the attorney of record of the opposite party. *Ibid.*
3. Litigants are presumed to take notice of all that is done in actions to which they are parties. *Stancill* v. *Gay*, 455.
4. The registration of a prior voluntary deed is notice to the subsequent purchaser. *Taylor* v. *Eatman*, 601.

PAR DELICTUM:

1. Where the jury found that the defendant administrator had, in another action in which he was plaintiff, fraudulently suffered a judgment to be entered, by which the estate of his intestate was cheated; *It was held*, that a motion would not be allowed to reinstate said action and set aside fraudulent judgment. *Sherner* v. *Spear*, 148.
2. Courts of justice will not aid a party to a fraudulent transaction to force his confederates in fraud to account. *Ibid.*

PARTIES:

1. Where the cause of action is the equity of remaindermen to secure a trust fund which is being, or has been, misapplied by the life-tenant, all of the remaindermen are necessary parties. *Hunter* v. *Kelly*, 68.

2. Where, under the provisions of a stock law, which erected adjoining portions of two counties into a stock-district, the taxpayers resident in one county have paid more than their proportion of the tax, the county commissioners are the proper parties to bring an action to recover the amount so overpaid. *Commissioners of Greene* v. *Commissioners of Lenoir*, 180.

3. The Court will not grant an order to make parties, unless it appears probable that the proposed parties are in some way necessary to a proper and complete determination of the action. *Lee* v. *Eure*, 283.

4. Where the Superior Court ordered a *nol. pros.* as to certain defendants, who appealed from the order, and moved in the Supreme Court to make other persons parties, whose presence in the action was only necessary if the *nol. pros.* had been erroneously entered; *Held*, that the motion to make parties will not be considered, until the *nol. pros.* is disposed of. *Ibid.*

5. Where property is conveyed to trustees to receive the rents and profits, and pay them to the *cestui que trust*, beyond the necessary expenses and repairs, the *cestui que trusts* are not proper parties in an action to recover labor done on the property. *Cheatham* v. *Rowland*, 340.

6. The plaintiff having transferred the claim, upon which this action was subsequently brought, to an attorney at law, for collection, and with directions to him to apply the proceeds to demands which he held for collection against the plaintiff due other parties, the plaintiff cannot maintain an action in his name to recover the sum alleged to be due upon the claims. *Wynne* v. *Heck*, 414.

7. That the effect of the transfer was to vest the ownership of the claim in the attorney, as a "Trustee of an Express Trust," and the action should have been brought in his name alone, or, in conjunction with those of the *cestui que trust*. *Ibid.*

7. A claimant to land in dispute between other parties to a suit, who is not connected with any interest in that controversy, but claims by a title different from that of both claimants in the suit, cannot intervene and become a party. A party may intervene when he has an interest in the controversy, but not when he has an interest in the thing which is the subject of the controversy. *Asheville Div.* v. *Aston*, 588.

8. An appeal can be taken from an order of the Superior Court either making or refusing to make additional parties, when such order affects a substantial right of the appellant; and *it seems* that the appeal may either be taken at once, or it can be assigned as error on an appeal from the final judgment. *Merrill* v. *Merrill*, 657.

9. An appeal lies at once from an interlocutory order that may in effect put an end to the action, or that may prejudice a substantial right of the party complaining. *Ibid.*

10. The Court has no power to convert a pending action that cannot be maintained, into a new one by admitting a new party plaintiff, who is solely interested, and allowing him to assign a new cause of action. *Ibid.*

11. Where an administrator dies, no one but an administrator *de bonis non* of his intestate can call his estate to account for the assets of his intestate. *Ibid.*

12. Where a suit was pending by the next of kin against an administrator for the distribution of the estate in his hands, and the defendant died; *it was held*, that the action could not be prosecuted by the next of kin after the death of the administrator, and further that the Court had no power to allow an administrator *de bonis non* to be made a party plaintiff in the pending action. *Ibid.*

PARTITION:

1. Where, in a special proceeding for partition, an appeal is taken to the Judge, it is error for him to remand the cause, with directions. It is the duty of the clerk to obey the order, without any thing further being done. *Harper* v. *Harper*, 300.
2. Where a sale for partition is made among tenants-in-common, one of whom is entitled to a life interest only, the tenant for life must have the interest on the value of the share to which he is entitled paid to him for his life, and he is not entitled to have the value of his life-estate ascertained, and a sum in gross paid to him therefor. *Winstead, Ex-parte*, 703.
3. By section 1909 of *The Code*, in a sale for partition of land subject to dower where the widow is a party, her life-estate may be valued in money, and the money paid to her in lieu of the interest for life on one-third of the proceeds of sale. *Ibid.*

PAYMENT:

1. Where A holds notes of B, as his agent for collection, and borrows money from a third party to enable the debtor to pay the debt, as soon as the money comes into his hands, it is applied, and the note is paid. *Grandy* v. *Abbott*, 33.
2. Where a bond executed by two obligors, is presumed to be paid by the lapse of time, the declarations of one of the obligors is not competent to rebut the presumption as to the other. *Rogers* v. *Clements*, 81.
3. In order to rebut the presumption of payment, it must be proved that the bond has not been paid by any of the debtors. The separate acknowledgment of one debtor is not even sufficient to charge him. *Ibid.*
4. Authority delegated by a creditor to an agent to collect and settle a debt, leaves the medium of payment largely at the agent's discretion, but it does not extend to a settlement which the debtor knows will enure entirely to the benefit of the agent. *Williams* v. *Johnston*, 532.
5. When it was agreed between the vendor and vendee of land that the cotton raised on the land during each of the five years for which credit was given, should be forwarded to the plaintiff and sold and the proceeds applied to the payment of the purchase money, the cotton is in advance appropriated to the debt, and as soon as the money is received, the debt is *pro tanto* satisfied, and can only be revived by the consent of the debtor. *Williams* v. *Whiting*, 683.
6. This consent may be express or result from implication, and, if the latter, must rest on clear and unequivocal evidence of intent. *Ibid.*

7. Where a testator was indebted to the person he appoints his executor and leaves certain property to the executor in payment of the debt, which proved to be of less in value than the amount of the debt, the executor, after proving the will, cannot elect to assert his rights as a creditor and retain his debt out of other assets of the estate. *Syme* v. *Badger*, 706.
8. It is immaterial that the executor acted under a mistaken idea of the legal consequences of proving the will. *Ibid.*

PERSONAL PROPERTY EXEMPTION:

Where a party is ordered to pay money into court, or be attached for contempt in failing to do so, and swears that after every effort it is out of his power to pay it, the rule for contempt will be discharged; but where, on a return to the rule, he does not swear that he cannot borrow the money, and does show that he has some personal property, although exempt from seizure under final process for the payment of debts as personal property exemptions, the rule will not be discharged. *Smith* v. *Smith*, 304.

PETITION TO REHEAR:

1. Under the rule requiring petitions to rehear to be filed within twenty days after the commencement of the succeeding term, the first day of the period allowed is to be excluded from the count, and the last day also, when it falls on Sunday. *Barcroft* v. *Roberts*, 249.
2. Under the rule, petitions to rehear are confined to alleged errors in law, or to newly discovered evidence. *Ibid.*
3. A petition to rehear should point out the ruling which is alleged to be erroneous, but should not, by a course of reasoning, undertake to show that it is erroneous. The argument should be made at the hearing, and not in the petition to rehear. *White* v. *Jones*, 388.

PLEADING:

Where a contract contains mutual and dependent covenants, before the plaintiff can enforce it, he must allege that he has performed all of his covenants, or that he is ready to perform them. *Wilson* v. *Lineberger*, 547; *Ducker* v. *Cochrane*, 597.

PONDING WATER:

1. In proceedings under the statute for ponding water on plaintiff's land, the jury have no right to go back further than one year in assessing damages, but if they do, the error may be corrected by the Court only giving judgment for one year preceding the issuing of the summons. *Goodson* v. *Mullen*, 207.
2. Where, in such proceedings, the annual damages are assessed at less than $20 per annum, the judgment is for five years, including the year preceding the filing of the petition, for each year's damages so assessed, with a *cessat executio* for each year after the first year. *Ibid.*

3. Where the damages were assessed at as much as $20 a year, the judgment was the same, except that the plaintiff had his election to take judgment for five years, or only for the one year preceding the filing of the petition, in which case he was at liberty to bring his action at common law; but if the action was continued for more than five years, the judgment was for the entire amount, and the plaintiff was barred of his election. *Ibid.*

4. Where the jury find the damages are different for different years, they should assess them separately for each year. *Ibid.*

5. By §1860 of *The Code*, the damages are to be assessed for five years, as they were prior to the Act of 1877, ch. 197. *Ibid.*

POSSESSION:

1. In case of common possession by two persons, the ownership draws to it the possession, and it is presumed to be in him who has the title. *Gaylord* v. *Respass*, 553.

2. A grant from the State will be presumed from thirty years' possession, although no privity can be traced between the successive occupants. *Dills* v. *Hampton*, 565.

3. Possession by a grantee of any part of the land described in his deed, is constructive possession of the entire tract against all persons, except a party having a superior title to the part of which there is only constructive possession. *Staton* v. *Mullis*, 623.

4. When a witness swears to his possession, with repeated acts of ownership extending over many years, which evidence is allowed to go unchallenged to the jury, it is not improper for the Judge to assume a legal possession to have been testified to and to so present the case in his charge to the jury. *Ibid.*

5. If the true owner enters on land, the possession at once follows the title, and both title and possession are then in him. A possession thus acquired by the true owner, although he enters under a mistaken and erroneous claim, nevertheless, is supplied by the legal estate, and the owner, in law, holds by his real, and not by his pretended title. *Logan* v. *Fitzgerald*, 644.

6. When the true owner enters, as an assertion of his right, it is not necessary to expel the occupant in possession at the time of such entry. *Ibid.*

7. Where the defendant was in actual possession of a part of the *locus in quo*, and had constructive possession of the rest, and the true owner, the plaintiff, enters upon the part of which the possession was constructive; *Held*, that such entry at once vests the possession in him, and seven years must elapse from such entry, before the defendant can acquire title by lapse of time. *Ibid.*

POWER OF APPOINTMENT:

1. A *feme covert*, who is the donee of a power of appointment, either collateral, appurtenant or in gross, may execute the power without the consent of her husband, and she may even execute it in his favor. *Taylor* v. *Eatman*, 601.

2. Although it is generally necessary in deeds or wills, which are intended to execute powers of appointment, to refer to and recite the power, yet this is not necessary when the act itself shows that the donee had in view the subject of the power at the time, or when such deed or will would be a nullity, unless allowed to operate as the execution of the power. *Ibid.*

3. A power simply collateral cannot be conferred upon one who is a stranger to the consideration, except by a deed which operates by transmutation of possession. *Ibid.*

4. The rule, that in conferring a power it is necessary to create a seizin in some one commensurate with the estate, which shall be ready to serve the use when created by the appointment, only applies when the donee of the power has no interest in the land. *Ibid.*

POWER OF SALE:

1. A sale to a mortgagee by himself, under a power of sale in the mortgage deed, is ineffectual to divest the equity of redemption from the mortgagor, and the relation of the parties is not changed by that act. *Howell* v. *Pool*, 450.

2. While courts permit the use of powers of sale in mortgages, they regard them with much suspicion and watchfulness, and will enjoin their execution when an attempt is made to use them for the purpose of oppressing or obtaining an unfair advantage over the mortgagor. *Gooch* v. *Vaughan*, 610.

3. Where it appears in an application to enjoin a mortgagee from selling the mortgaged property under the power of sale, that there are many and complicated accounts between the mortgagor and mortgagee, and the balance due is uncertain, the Court will restrain the execution of the power of sale until an account can be stated and the amount due ascertained. *Ibid.*

4. In such case, the rule which requires a mortgagee, in certain cases, to pay the amount admitted to be due before the injunction will be granted, does not apply, because no definite sum is known to be due. *Ibid.*

5. A mortgagee with power of sale, is a trustee, 1st, to control the property and apply the proceeds to the debt; 2d, to account for any surplus to the mortgagor; and he is held to a strict account. *Ibid.*

PRESENCE OF PRISONER IN COURT:

Upon the removal of a trial for murder, the record showed that the prisoner was arraigned, and then the order of removal immediately follows, before any order remanding the prisoner: *Held*, that it appears by necessary implication that the prisoner was in court when such order was made. *State* v. *Anderson*, 732.

PRESUMPTION OF PAYMENT:

1. Where a bond executed by two obligors is presumed to be paid by the lapse of time, the declarations of one of the obligors is not competent to rebut the presumption as to the other. *Rogers* v. *Clements*, 81.

2. In order to rebut the presumption of payment, it must be proved that the bond has not been paid by any of the debtors. The separate acknowledgment of one debtor is not even sufficient to charge him. *Ibid.*

PRIVILEGE OF COUNSEL:

When there is a direct conflict between the testimony of a witness and of the defendant, who offers himself as a witness, and evidence is offered to show the good character of the witness, it is legitimate ground of comment by the solicitor, that no witness has been examined to show the good character of the defendant. *State* v. *Davis*, 764.

PROBATE:

1. The provisions in the Acts of 1868-'69, ch. 64, requiring the certificate of probate by the Probate Judge of a county, other than the county of registration, to be passed on by the Probate Judge of the latter county, is directory only. So, where a mortgage on land in Cleveland county was proven by the Probate Judge of Mecklenburg and registered in Cleveland without being submitted to or passed upon by the Probate Judge of the latter county; *It was held*, that the probate was not void and the mortgage admissible in evidence. *Young* v. *Jackson*, 144.
2. Where a will, proved in another State, bears the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication; *Held*, inadmissible in evidence. *Hunter* v. *Kelly*, 285.
3. Where the grantor in a deed is dead, and the subscribing witness has been a non-resident of the State and not heard from for a number of years, and it is impossible to prove his hand-writing, the deed may be proved and registered upon evidence that the signature of the grantor is genuine, without proving the hand-writing of the subscribing witness. *Howell* v. *Ray*, 510.
4. Where, in such cases, the evidence upon which the Probate Judge acted in ordering the registration is set out in full, and it appears that such evidence was insufficient, the registration is void. *Ibid.*

PROBATE COURTS:

The former courts of probate had exclusive jurisdiction of proceedings to settle the estates of deceased persons. *Stancill* v. *Gay*, 455.

PROCESS:

1. The office of the summons is to bring the parties into court, the nature of the action is shown by the complaint. *Barneycastle* v. *Walker*, 198.
2. The failure of sheriff to note on summons the day it is received is irregular, but it does not render the summons void. *Strayhorn* v. *Blaylock*, 292.
3. If it is served less than ten days before return day the action ought not to be dismissed, but further time ought to be allowed defendants to answer. *Ibid.*

4. When the sheriff returns that he has "served" the summons, this is *prima facie* sufficient and implies that he has served it as the statute directs, until the contrary is made to appear in some proper way. *Ibid.*

5. If the service is insufficient the plaintiff is entitled to an *alias*, and it is error to dismiss the action. *Ibid.*

6. By accepting service of the summons, the parties are brought into court and made parties to the action, and must take notice of the proceedings, and are bound by the judgment of the Court. *Stancill* v. *Gay*, 455.

7. A judgment rendered against infant defendants who were never served with process, is void. *Stancill* v. *Gay*, 462.

8. The receipt of money by the infants under such judgment does not give it vitality. *Ibid.*

9. *The Code*, sec. 387, making valid judgments against infants in cases where they are not personally served does not apply to cases where there has been no service on the infant or on any person for him. *Ibid.*

10. A local agent of a foreign corporation, upon whom process can be served so as to bring the corporation into court, means an agent residing either permanently or temporarily in this State for the purpose of his agency, and does not include a mere transient agent. *Moore* v. *The Bank*, 590.

11. An attorney for a foreign corporation, who has claims to collect for it in this State, is not a local agent upon whom process can be served. *Ibid.*

12. *It seems*, that the affidavit to obtain an order for the publication of a summons, may be made after the order, provided the order remains in abeyance until the affidavit is filed. *Bank* v. *Blossom*, 695.

13. Where notice of an attachment and summons was published in one notice for five weeks, it was held a sufficient publication of the notice of the attachment, but not of the summons. *Ibid.*

14. Where a publication of a summons was only made for five weeks, the Court has power to retain the action and order a sufficient publication. *Ibid.*

PRODUCTION OF PAPERS:

Where, in supplemental proceedings, the examination of the debtor shows that his books of account contain evidence material to the investigation, he should be required to produce them. *Coates* v. *Wilkes*, 376.

PUBLIC DOCUMENTS:

Papers purporting to be exemplifications from the Treasury Department of the United States, but which were not authenticated in any manner whatever, cannot be admitted in evidence. *Mott* v. *Ramsay*, 152.

PUBLICATION:

1. *It seems*, that the affidavit to obtain an order for the publication of a summons, may be made after the order, provided the order remains in abeyance until the affidavit is filed. *Bank* v. *Blossom*, 695.

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4. Where notice of the attachment is omitted from the order of publication, but in the published notice the defendant is informed that an attachment has been issued against his property, to what court it is returnable, &c., the Court has power to amend the order of publication, so as to insert a requirement that notice be given of the attachment. *Ibid.*

5. *Quære*, whether such amendment is necessary. *Ibid.*

PUNISHMENT:

1. But where the Court adjudges that the defendant be fined and imprisoned, and the fine is paid and part of the imprisonment undergone, the Court cannot, even at the same term, recall and suspend the judgment, and at a subsequent term sentence him again for the same offence. *State* v. *Warren*, 825.

2. No person can be twice punished for the same offence, and the second judgment under such circumstances is void. *Ibid.*

3. *It seems*, that with the consent of the convict, the Court may sub-divide the term of imprisonment, so that a portion of it may be suffered at one time and the residue at another. *Ibid*

PURCHASER:

1. To make a deed fraudulent as to subsequent purchasers, such purchasers must have paid *full value* for the land, and must also have purchased without notice of the prior voluntary conveyance. *Taylor* v. *Eatman*, 601.

2. The registration of the prior voluntary deed is notice to the subsequent purchaser. *Ibid.*

3. A purchaser from a fraudulent donee, in order to get a good title, must purchase without notice of the fraudulent character of his vendor's title. *Davis* v. *Council*, 725.

PURCHASER AT EXECUTION SALE:

1. Where the purchaser, at execution sale, is a stranger to the judgment, he gets a good title, although the sheriff may have failed to advertise the property and give notice to the judgment-debtor, as prescribed by §§456 and 457 of The Code. All that such purchaser is required to ascertain is, that it is an officer who sells, and that he is empowered to do so by an execution issued by a court of competent jurisdiction. *Burton* v. *Spiers*, 503.

2. But when at such sale, the plaintiff in the execution, or his attorney or agent, or any other person affected with notice of such irregularity, purchases, the sale may be set aside at the instance of the defendant in the execution, by a direct proceeding for that purpose. *Ibid.*

3. Execution sales cannot be *collaterally* avoided because of irregularities in the manner in which they have been conducted. *Ibid.*

4. When there is fraud and collusion between the sheriff and the purchaser at execution sale, the sale is absolutely void, and such defect may be taken advantage of by any one interested in the property sold; but when the fraud results from the conduct of the plaintiff alone, as in suppressing bidding, &c., there being no collusion between the sheriff and the purchaser, the sheriff's sale passes the title, and the execution-debtor must seek his relief in equity. *Ibid.*

RATIFICATION:

1. Where an agent exceeds his authority, his principal must either wholly ratify, or wholly repudiate the transaction. *Rudasill* v. *Falls*, 222.

2. A power to act for another, however, general its terms or wide its scope, cannot be enlarged into a power to pervert funds coming into the agent's hands, without clear approval or ratification by the principal. *Williams* v. *Whiting*, 683.

RECEIPT.

When a receipt is evidence of a contract between the parties, it stands on the same footing as other contracts in writing, and cannot be contradicted or varied by parol; but when it is merely the acknowledgment of the payment of money or the delivery of goods, it may be contradicted by parol. *Harper* v. *Dail*, 394.

RECEIVER:

1. Where the application for a receiver is based upon the alleged fraudulent character of a conveyance, the question of whether or not the deed is fraudulent belongs to the final hearing of the cause, and the alleged fraud will only be considered on such motion for a receiver, as showing grounds for the protection of the fund untill the final hearing. *Rheinstein* v. *Bixby*, 307.

2. In such case, a receiver will not be appointed, unless it is manifest that the fund is mismanaged and in danger of being lost, or where the insolvency of an unfit trustee is present or imminent. *Ibid.*

3. Supplemental proceedings are substituted in the present system of procedure for the method of granting relief in equity in the former system, and to accomplish their purpose of reaching the judgment-debtor's property of every kind that cannot for any cause be reached by execution, injunctions may be granted and receivers appointed in them as occasion may require. *Coates* v. *Wilkes*, 376.

4. The appointment of a receiver in these proceedings does not rest solely in the discretion of the Judge, and his action in appointing or refusing to appoint is subject to a review by the Supreme Court. *Ibid.*

5. It is not necessary in order to warrant the appointment of a receiver in such proceedings that it should appear with perfect certainty that the

debtor has property which ought to be applied to the payment of the judgment. It is sufficient if there is reasonable ground to believe that he has such property. *Ibid.*

6. The general principles of law applicable to receivers apply to those appointed in supplemental proceedings. It is the duty of such receiver to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. *Ibid.*

7. The motion for such receiver may be made before the Judge, pending an appeal to him from the ruling of the clerk upon other questions. *Ibid.*

8. In application for receivers and injunctions in supplemental proceedings, the Supreme Court will examine the evidence and pass upon the facts. *Ibid.*

9. Where there is reason to apprehend that the subject of the controversy will be destroyed, or removed, or otherwise disposed of by the defendants, pending the action, so that the plaintiff may lose the fruit of his recovery, the Court will take control of it by the appointment of a receiver, or by the grant of an injunction, or by both, if necessary, until the action shall be tried on its merits. *Ellett* v. *Newman*, 519.

10. A receiver, appointed under the act (The Code, §670) to wind up the affairs of corporations, can proceed to collect in the assets, and to prosecute and defend suits, after the corporation has ceased to exist by the expiration of its charter. *Asheville Div.* v. *Aston*, 578.

RECORD:

1. The power of a court to amend its record at a subsequent term is essential, and such amendment should not be made by simply noting the order to amend, but it should be actually made by correcting the minutes of the former term. *McDowell* v. *McDowell*, 227.

2. Upon the removal of a trial for murder, the record showed that the prisoner was arraigned, and then the order of removal immediately follows, before any order remanding the prisoner; *Held*, that it appears by necessary implication that the prisoner was in court when such order was made. *State* v. *Anderson*, 782.

3. Where an affidavit for the removal of a case stated that the State could not get justice in either Mitchell or Yancey counties, and this was recited in the order, and the cause removed to Caldwell county; *Held*, to be no ground for an arrest of judgment. *Ibid.*

4. Where the clerk sends a defective transcript, on the removal of a cause, it is not a compliance with the order, and he may, of his own motion, send another. *Ibid.*

5. There is no necessity, in a prosecution, for the record to show a joinder of issue by the State to prisoner's plea of not guilty. *State* v. *DeBerry*, 800.

RECORDARI:

1. *Recordari* will not be issued unless party applying shows (1) excuse for laches and (2) meritorious grounds. *Pritchard* v. *Sanderson*, 41.

2. Amendment of petitions, &c., is matter of discretion and not subject to review. *Ibid.*

REFERENCE:

1. Where a reference is made at the instance of the plaintiff, and without objection by the defendant, it is a reference by consent. *Harris* v. *Shaffer*, 30.
2. It is doubtful whether the Court has power to allow parties to agree that a trial by jury may be had on exceptions to a referee's report, when the reference is by consent. *Ibid.*
3. Where an order of reference contained the provision that either party might demand a jury trial upon exceptions to a referee's report, if entitled to a trial by jury at all, it must be demanded when the exceptions are filed. *Ibid.*
4. The minute in writing of the evidence of a witness examined before a referee is not admissible in evidence on the trial of an issue before a jury in the same cause. *Mott* v. *Ramsay*, 152.
5. Papers purporting to be exemplifications from the Treasury Department of the United States, but which were not authenticated in any manner whatever, cannot be admitted in evidence. *Ibid.*
6. Even if such papers had been admitted as evidence before the referee, this does not make them evidence in a trial before a jury, unless by consent. *Ibid.*
7. In references by consent, it is only when there is no evidence reasonably sufficient to warrant the referee's findings of fact, that a matter of law is presented, reviewable on appeal. *Hunter* v. *Kelly*, 285.
8. Where a party excepts to the report of a referee, because he fails to find on a particular matter as a fact, and the report is recommitted to the referee to pass on this matter, he cannot be allowed to except to the second report, because it is a mixed question of law and fact. *Tyson* v. *Tyson*, 288.
9. The Court will not set aside a report and order a re-reference on the ground that the referee has failed to pass on certain matters involved in the account, when the report furnishes *data* from which the account can be stated. *Grant* v. *Edwards*, 442.
10. A referee is not required to refer to the evidence in his findings of fact. All that is required is that he should transmit to the Court the evidence upon which his findings are based. *Barbee* v. *Green*, 471.
11. Where the Supreme Court cannot pass upon the facts, it cannot look into the evidence upon which the referee bases his findings of fact, unless the exception is that he has found facts with no evidence to support them. *Ibid.*
12. Where, on exceptions to a referee's report, the Judge does not find any facts, but overrules all the exceptions to the report, he is presumed to have adopted the findings of the referee. *Ibid.*

13. When the referee fails to report the evidence, the proper course is to move to recommit or to require the referee to produce the evidence. *Williams* v. *Whiting*, 683.

REGISTRATION:

1. The provisions in the Acts of 1868-'69, ch. 64, requiring the certificate of probate by the Probate Judge of a county, other than the county of registration, to be passed on by the Probate Judge of the latter county, is directory only. So, where a mortgage on land in Cleveland county was proven by the Probate Judge of Mecklenburg and registered in Cleveland without being submitted to or passed upon by the Probate Judge of the latter county; *It was held*, that the probate was not void and the mortgage admissible in evidence. *Young* v. *Jackson*, 144.
2. An unregistered deed is color of title, and may be read in evidence without registration, upon due proof of its execution. *Hunter* v. *Kelly*, 285.
3. Where an agricultural lien is made by a vendee who has paid only a portion of the purchase money, of which the vendor has notice but makes no objection, his assent to the lien will be presumed and registration of the lien is sufficient notice. *Dail* v. *Freeman*, 351.
4. Where the grantor in a deed is dead, and the subscribing witness has been a non-resident of the State and not heard from for a number of years, and it is impossible to prove his hand-writing, the deed may be proved and registered upon evidence that the signature of the grantor is genuine, without proving the hand-writing of the subscribing witness. *Howell* v. *Ray*, 510.
5. Where in such cases, the evidence upon which the Probate Judge acted in ordering the registration is set out in full, and it appears that such evidence was insufficient, the registration is void. *Ibid.*
6. The registration of the prior voluntary deed is notice to subsequent purchasers. *Taylor* v. *Eatman*, 601.
7. Where a vessel which was duly enrolled under the act of Congress, but which was entirely used in North Carolina waters, was mortgaged, which mortgage was registered in the custom-house in accordance with the act of Congress, but was not registered as required by the North Carolina registration acts; *It was held*, that such registration was valid. *Lawrence* v. *Hodges*, 672.
8. Such mortgage can be proven before a clerk of the Superior Court, as he is *ex officio* a notary public. *Ibid.*

REMAINDER:

1. Where a reversion or remainder, expectant upon a freehold estate, comes by descent, and the reversioner or remainderman dies during the continuance of the particular estate, a person claiming the estate by inheritance must make himself heir to the original donor who erected the particular estate. *King* v. *Scoggin*, 99.
2. Where the reversion or remainder comes by descent and is conveyed by deed or devise to a stranger, before the determination of the particular estate, the donee takes by purchase, and the estate will descend to his heirs. *Ibid.*

3. Where the remainder or reversion is acquired by purchase, one claiming the estate by descent must make himself heir to the first purchaser of the remainder or reversion at the time when it comes into possession. *Ibid.*

4. Where A, having a life-estate, conveys to B in fee who conveys to C, the remainderman does not have a right of action until the death of the life tenant; but, at his death, the possession becomes adverse. *Staton* v. *Mullis*, 623.

5. When the plaintiff claims under a deed purporting to convey the land in dispute, the burden of proof is on the defendant, when he claims a reversionary estate after a life-estate, to show that such life-estate determined too short a time before the bringing of the action to bar his right. *Ibid.*

REMOVAL OF A CAUSE:

1. Where an affidavit for the removal of a case stated that the State could not get justice in either Mitchell or Yancey counties, and this was recited in the order, and the cause removed to Caldwell county; *Held*, to be no ground for an arrest of judgment. *State* v. *Anderson*, 732.

2. It is no ground to arrest the judgment because, on such removal, two transcripts are sent to the county to which it is removed, although the first is defective, and the second is transmitted without a writ of *certiorari*. *Ibid.*

3. Where the clerk sends a defective transcript, on the removal of a cause, it is not a compliance with the order, and he may, of his own motion, send another. *Ibid.*

4. Upon the removal of a trial for murder, the record showed that the prisoner was arraigned, and then the order of removal immediately follows, before any order remanding the prisoner; *Held*, that it appears by necessary implication that the prisoner was in court when such order was made. *Ibid.*

REMOVAL OF CROPS:

Indictment charged defendant with removal of part of crop made on the land under a lease executed on 1st November, 1883, and running one year. The proof was that defendant removed part of crop made in 1883, under a lease made in March, 1883; *Held*, that the offence proved is different from that charged in the indictment. *State* v. *Ray*, 810.

RENT:

There is no implied contract that the lessor will not molest the lessee, but there is an implied condition, upon a breach of which the lessee is discharged from his obligation to pay rent. *Barneycastle* v. *Walker*, 198.

RES ADJUDICATA:

1. The refusal of the Judge to extend the time to file an answer is not *res adjudicata* in a motion to set aside such judgment for excusable neglect. *Warren* v. *Harvey*, 137.

2. After a motion to recall an execution and set aside a judgment has been once heard and refused upon full evidence, it becomes *res adjudicata*. *Moore* v. *Grant*, 316.

RE-SALE:

1. In a sale of land by order of Court, the Court has the power to re-open the bidding, and order the land to be sold a second, and possibly a third time for extraordinary cause, but the power should be exercised cautiously. *Hinson* v. *Adrian*, 121.
2. Where an interlocutory order, made by consent, directs the judicial sale of land, the parties to the action cannot change the terms of the order by consent, in a manner detrimental to the interest of a purchaser at such sale. *Vaughan* v. *Gooch*, 524.
3. A consent order directed a sale of certain lands by a commissioner, that said commissioner execute a deed to the purchaser, and further directed him how to apply the proceeds of the sale, but contained no provision for re-opening the biddings. After the sale, an advance of ten per cent. on the amount bid; *Held*, that the refusal by the Superior Court to open the biddings was proper. *Ibid.*
4. It is a well settled rule of practice in this State, that in judicial sales, the biddings will be opened and a re-sale ordered, if, before the sale is confirmed, an advance of ten per cent. is offered. After confirmation the biddings will not be re-opened, except in case of fraud or unfairness, or some other adequate cause. *Trull* v. *Rice*, 572.
5. Where, however, the Judge below, in the exercise of his discretion refuses to open the biddings on an advance of ten per cent. before the sale is confirmed, the Supreme Court will not direct him to do so. *Ibid.*
6. In an application to set aside a sale and re-open the biddings, the Supreme Court will not look into conflicting affidavits, but are governed by the facts as found by the Judge. *Ibid.*

RETAINER:

Where a testator was indebted to the person he appoints his executor and leaves certain property to the executor in payment of this debt, which proved to be less in value than the amount of the debt, the executor, after proving the will, cannot elect to assert his right as a creditor and retain for his debt from the other assets of the estate. *Syme* v. *Badger*, 706.

REVERSION:

1. Where a reversion, expectant upon a freehold estate, comes by descent, and the reversioner dies during the continuance of the particular estate, a person claiming the estate by inheritance must make himself heir to the original donor who erected the particular estate. *King* v. *Scoggin*, 99.
2. Where a reversion comes by descent and is conveyed by deed or devise to a stranger, before the determination of the particular estate, the donee takes by purchase and the estate will descend to his heirs. *Ibid.*

3. Where the reversion is acquired by purchase, one claiming the estate by descent must make himself heir to the first purchaser of the reversion at the time when it comes into possession. *Ibid.*

4. Where A, having a life-estate, conveys to B in fee who conveys to C, the reversioner does not have a right of action until the death of the life tenant. At his death the possession becomes adverse, and will ripen into a good title by seven years' possession. *Staton* v. *Mallis*, 623.

ROADS:

Where an overseer of a road entered and took possession of a piece of land for the purposes of the road, under a license from the tenant of the plaintiff, he is liable in damages in an action by the owner of the fee. *Dills* v. *Hampton*, 565.

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SALE OF LAND FOR ASSETS:

1. In 1869 the plaintiff's intestate obtained judgments against the ancestor o the defendants, on debts contracted in 1866, and a homestead was allotted to the defendant, which, at his death, was re-allotted to his infant children, the present defendants. A petition was filed by the debtor's administrator to sell the homestead to make assets to pay the judgments; *Held*, 1st, that by assenting for so long a time to the homestead allotment, and by availing themselves of the provision of the statute, which prevented their judgments from being barred, the creditors were precluded from denying the right of the infants to the homestead; 2nd, that the creditors were entitled to have the reversion after the determination of the homestead, not the absolute estate in the land, sold to pay their debts. *Cobb* v. *Halyburton*, 652.

2. Before the Act of 1846, the lands of a decedent could not be sold to pay a debt upon which a judgment *quando* had been rendered against the administrator; but since the passage of this act, which makes the proceeds of land, when sold, assets in the hands of the personal representative for the payment of debts, a judgment *quando* may be satisfied from the proceeds of the sale of the decedent's lands. *Wilson* v. *Bynum*, 717.

3. Land is not assets until it is sold and the proceeds received by the personal representative. *Ibid.*

4. *Quære*—Whether an administrator can be sued on his bond when he has been negligent in not obtaining an order to sell his intestate's land for assets. *Ibid.*

5. Where it is necessary, and the administrator fails to take the proper steps to sell his intestate's real estate for assets, he may be compelled by the clerk to do so, or a creditor may file a creditor's bill in the Superior Court against the administrator or executor, and the heirs-at-law or devisees, for the sale of the land. *Ibid.*

6. Where the complaint alleged that the plaintiff had a judgment against the estate of a decedent; that the assets of the estate were exhausted; that certain lands devised by the decedent were in the possession of his devisees, and that the personal representative had refused to apply for an order directing the sale of said land to make assets; *It was held*, that the complaint set out a cause of action. *Ibid.*

SCALE:

1. Where an executor sold property of his testator in July, 1863, on nine months credit, he is liable for the scaled value of the money for which it sold, at the time of the sale and not at the expiration of the time of credit. *Depriest* v. *Patterson*, 399.

2. An executor during the war took certain notes belonging to the estate of his testator, and substituted for them Confederate money of his own. The notes proved to be worthless; *Held*, that he is chargeable with the scale value of the Confederate money at the date of the attempted substitution. *Depriest* v. *Patterson*, 402.

SEAL:

1. A seal to a deed, although not on the line with the signature of the vendor, if it purports to be his seal and is referred to as his seal, is valid and will be held to be the act of the vendor. *Harrell* v. *Butler*, 20.

2. A seal imports, or rather dispenses with proof of consideration, except when equitable relief is sought. *Burly* v. *Buxton*, 479.

SEIZIN:

The rule, that in conferring a power it is necessary to create a seizin in some one commensurate with the estate, which shall be ready to serve the use when created by the appointment, only applies when the donee of the power has no interest in the land. *Taylor* v. *Eatman*, 601.

SERVICE OF PROCESS:

1. A notice of a motion to set aside a judgment may be properly served on the attorney of record of the opposing party. *Branch* v. *Walker*, 87.

2. The failure of the sheriff to note on the summons the day it was received is irregular, but does not render the summons void. *Strayhorn* v. *Blalock*, 292.

3. If it is served less than 10 days before the return day, the action should not be dismissed, but further time should be allowed the defendants to answer. *Ibid.*

4. When the sheriff returns that he has "served" the summons, it is *prima facie* sufficient, and implies that he has served it as the statute directs, until the contrary is made to appear in some proper way. *Ibid.*

5. If the service is sufficient, the plaintiff is entitled to an *alias*, and it is error to dismiss the action. *Ibid.*

6. By accepting service, parties are brought into court and are bound by the judgment. *Stancill* v. *Gay*, 455.

7. A judgment against an infant defendant who was never served with process, is void. *Ibid.*

8. *The Code*, sec. 387, making valid judgments against infants in cases where they are not personally served with process, does not apply to cases where there has been no service on the infant, or on any person for him. *Ibid.*

9. An attorney for a foreign corporation, who has claims to collect for it in this State, is not a local agent upon whom process can be served. *Moore* v. *The Bank*, 590.

10. A local agent of a foreign corporation upon whom process can be served so as to bring the corporation into court, means an agent residing either permanently or temporarily in the State for the purpose of his agency and does not include a mere transient agent. *Ibid.*

11. *It seems*, that the affidavit to obtain an order for the publication of a summons, may be made after the order, provided the order remain in abeyance until the affidavit is filed. *Bank* v. *Blossom*, 695.

12. Where notice of an attachment and summons was published in one notice for five weeks, it was held sufficient service of the notice of attachment but not of the summons. *Ibid.*

13. Where the publication of the summons is made for only five weeks, the Court has the power to retain the action and order a sufficient publication. *Ibid.*

SET-OFF:

1. A set-off is a defence to an action, and exists only in favor of a defendant. *Gatling* v. *Commissioners*, 536.

2. Where a municipal corporation is indebted to a tax-payer, the latter is not entitled either in law or equity to have the amount due him applied as a set-off against the amount he owes for taxes. *Ibid.*

SHIPS:

1. The power conferred upon Congress by the Constitution to regulate commerce with foreign nations and between the States, is paramount and exclusive, and includes the power to regulate navigation by all manner of vessels upon navigable waters flowing from one State into another, or from a State into the sea, and extends to giving to Congress the power to prescribe the methods of sale and transfer of such vessels. *Lawrence* v. *Hodges*, 672.

2. Enrolment under the act of Congress, and not the kind of service in which they are engaged, gives to vessels their national character, and renders them subject to the laws of the United States. *Ibid.*

3. Where a vessel which was duly enrolled under the act of Congress, but which was entirely used in North Carolina waters, was mortgaged, which mortgage was registered in the custom house in accordance with the act of Congress, but was not registered as required by the North Carolina registration acts; *It was held*, that such registration was valid. *Ibid.*

4. It is not necessary that a vessel used entirely on the waters of this State should be enrolled as required by the act of Congress, although it may be done, if the owner desires. *Ibid.*

5. Such mortgage can be proven before a clerk of the Superior Court, as he is *ex-officio* a notary public. *Ibid.*

SHOOTING AT TRAIN:

Where the defendant was indicted for shooting at a train with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the Court properly left the question of intent to the jury, and it was for them to say whether the presumption was rebutted. *State* v. *Barbee*, 820.

SLANDERING INNOCENT WOMEN:

1. The offence of slandering an innocent woman (*Code*, §1113) consists in the attempt to to destroy the reputation of an innocent woman by a charge of incontinency. *State* v. *Davis*, 764.

2. By an "innocent woman" is meant one who never had actual illicit intercourse with a man. *Ibid.*

3. *Quære*—Whether the slander of a woman who had once lapsed from virtue, but who had reformed and led an exemplary life, would be a crime under this statute. *Ibid.*

4. After conviction the defendant moved in arrest of judgment, because the indictment did not state "the circumstances under which the words were spoken by which the *attempt* is charged to have been made; *Held*, that this was not required; and that in indictments which charge statutory offences it is not only sufficient to use the words of the statute, but it was necessary to do so, or at least to use words of equivalent import. *Held further*, that the offence defined in the statute—*The Code*, §1113—is the attempt to destroy the reputation of an innocent woman, and when the indictment is for attempting to commit an offence, an exactness as great as in one which charges the offence itself is not essential. *State* v. *McIntosh*, 794.

SPECIAL PROCEEDINGS:

1. In special proceedings before the clerk, when issues of fact are joined, they must be certified to the court in term for trial. As soon as such issues are tried, it is the province of the clerk, and not of the Judge, to make orders in the cause. *Wharton* v. *Wilkerson*, 407.

2. Where, in such proceedings, the record does not disclose that issues of fact have been transferred to the court in term, any orders made by the Judge are extra-judicial. *Ibid.*

3. Proceedings to settle the estates of deceased persons are special proceedings. *Stancill* v. *Gay*, 455.

SPECIAL VERDICT:

1. A special verdict must find all the facts necessary to enable the Court to give judgment. *Hilliard* v. *Outlaw*, 266.

2. So, where a special verdict found that the contract sued on was an additional consideration for the loan of money, but failed to find that such a transaction was usurious in the State where it was to be performed; *Held*, that the special verdict was defective and a *venire de novo* must be awarded. *Ibid.*

SPECIFIC PERFORMANCE:

1. Where a bill in equity, filed under the former system of procedure by the vendee, to enforce the specific performance of a contract to convey land, and also praying for general relief, was dismissed, *it was held* that such dismissal was not an estoppel to an action brought under The Code to recover a sum of money alleged to have been paid in pursuance of said contract as a part of the purchase money for the land. *Pendleton* v. *Dalton*, 185.

2. Both legal and equitable rights may now be administered in one and the same action. Therefore, if an action is brought for the specific performance of a parol contract to convey land, to which the vendor pleads the statute of frauds, and it appears that a portion of the purchase money has been paid, the Court will give judgment against the vendor for the amount which he has received. *Ibid.*

3. A court may refuse, for equitable reasons, to compel specific performance of a contract legally binding, and leave the party to his remedy in the recovery of damages for its violation. *Ibid.*

4. Where a defendant has successfully resisted the specific performance of a contract, he will not be allowed to set-up such contract as binding in order to defeat an action brought to recover money paid in pursuance of said avoided contract. *Ibid.*

5. A court of equity will not decree the specific performance of a contract to convey land, until the full price has been paid; but this does not rest on the doctrine of lien, but upon the rule that a court of equity will refuse relief to one who will not do what, in equity, he ought to do. *White* v. *Jones*, 388.

6. Where a contract contains mutual and dependent covenants, specific performance cannot be decreed, unless the party seeking it alleges either that he has performed or is ready and willing to perform his part of the contract. *Wilson* v. *Lineberger*, 547.

STATUTE OF FRAUDS:

1. Both legal and equitable rights may now be administered in one and the same action. Therefore, if an action is brought for the specific performance of a parol contract to convey land, to which the vendor pleads the statute of frauds, and it appears that a portion of the purchase money has been paid, the Court will give judgment against the vendor for the amount which he has received. *Pendleton* v. *Dalton*, 185.

2. A parol contract to convey land is not void, but only voidable, if the vendor chooses to plead the statute of frauds. *Syme* v. *Smith*, 338.

3. The plaintiff administrator alleged that under a parol contract to purchase certain lands, his intestate had paid a portion of the purchase money, and prayed judgment against the defendants for the amount so paid. The defendants, by their answer, admitted the contract substantially as set out in the complaint; *Held*, that the action must be dismissed. *Ibid.*

4. Where it is agreed between the vendor and purchaser of a tract of land, that the purchaser shall have it surveyed at his expense, and if it shall be found to contain a smaller number of acres than is called for by the deed that the vendor shall refund a *pro rata* part of the purchase money; *Held*, that such contract is not within the provisions of the statute of frauds. *Sherrill* v. *Hagan*, 345.

5. A parol contract for the purchase of land, is voidable, not void. In such case, a vendee who is in possession is the tenant by sufferance of the vendor. *Dail* v. *Freeman*, 351.

STATUTE OF LIMITATIONS:

1. Where a creditor's claim, which has been reduced to judgment, is resisted by another creditor, on the ground that the cause of action on which the judgment was rendered was barred by the statute, the judgment having been rendered by a court of competent jurisdiction, the judgment is conclusive. *Moore* v. *Edwards*, 43.

2. An ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and the appropriation of its profits to himself for a less period than twenty years; and the result is not changed when one enters to whom a tenant in common has, by deed, attempted to convey the entire tract. This rule extends to purchaser of the interest of a tenant in common at execution sale, and to his vendees. *Ward* v. *Farmer*, 93.

3. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. *Dunlap* v. *Hendley*, 115.

4. It is settled in this State that demand must be made of an attorney or collecting agent, who has collected money for a client or principal, before an action will lie or the statute of limitations begin to run. But, when the reception of the money was unauthorized and wrongful, the plaintiff can waive the *tort*, and sue for money had and received to his use, without demand; and in this case the statute begins to run when the money is received, and bars the action in three years. *Bryant* v. *Peebles*, 176.

5. Where the pendency of a former action is relied on to stop the statute of limitations, it must appear that it was between the same parties, and for the same cause of action. *Pendleton* v. *Dalton*, 185.

6. If one tenant in common occupies the common property for twenty years, claiming it as his own, the entry of his co-tenants is tolled. *Gaylord* v. *Respass*, 553.

7. If a tenant in common is in possession under a title independent of the common title, *it seems* that a possession for seven years will bar his co-tenants. *Ibid.*

8. In case of the common possession by two persons, the ownership draws to it the possession, and it is presumed to be in him who has the title. So, where a ward resided with his guardian on a tract of land in which he had an interest as tenant in common, his possession is presumed to be in accordance with his title, and there is no adverse possession as against him. *Ibid.*

9. A deed conveying a life-estate is color of title, and when accompanied by adverse possession for the required time, will ripen into a good title to the life-estate so granted. *Staton* v. *Mullis*, 623.

10. Where A, having a life-estate, conveys to B in fee, who conveys to C, the reversioner or remainderman does not have a right of action until the death of the life tenant. At his death, the possession becomes adverse, and will ripen into a good title by seven years' possession, the title being out of the State. *Ibid.*

11. Where the defendant was in actual possession of a part of the *locus in quo*, and had constructive possession of the rest, and the true owner, the plaintiff, enters upon the part of which the possession was constructive; *Held*, that such entry at once vests the possession in him, and seven years must elapse from such entry, before the defendant can acquire title by lapse of time. *Logan* v. *Fitzgerald*, 644.

12. The act declaring that the statute of limitations shall not run against any debt owing by the holder of a homestead, which is affected by the act forbidding the sale of the reversion (Bat. Rev., ch. 55, sec. 26), has been repealed *Cobb* v. *Halyburton*, 652.

13. The statute begins to run against such debts from November 1, 1883, when the repealing act went into effect. *Ibid.*

14. The allotment of homestead is not *ipso facto* void even against debts contracted prior to the adoption of the constitution. It becomes so only when the debtor has no other property which can be subjected to the payment of such debts. *Ibid.*

STOCK LAW:

1. Special burdens imposed for local improvements by the Legislature are not unconstitutional. They are considered not so much a burden, as a compensation for the enhanced value which the taxed property is supposed to derive from the work. *Commissioners of Greene* v. *Commissioners of Lenoir*, 180.

2. The Legislature (Laws 1883, chaps. 70 and 214) erected adjoining territory in two counties into a no-fence district, and directed the commissioners of the two counties to erect a fence around said district and to defray the expense by a tax on all the realty in the district. More fencing was required in one county than in the other; *Held*, that a uniform tax on all the realty in the district must be imposed to pay the expense of the fence, irrespective of the amount of fencing required in each county. It is immaterial that parts of two counties are united in creating the district. *Ibid.*

3. Where the statute provided, that upon the written application of one-fifth of the qualified voters of any district or territory in certain counties, whether the boundaries follow township lines or not, it shall be the duties of the commissioners to submit the question of "Stock Law" or "No Stock Law," and if a majority of the votes shall be in a favor of the stock law, a fence shall be built; *Held*, that the commissioners have no power when several of these districts adjoin each other, to unite them into one territory, provide for the construction of one boundary fence, and assess a uniform tax on all the real property in the several districts so united, to meet the expense of the fence. *Bradshaw* v. *Commissioners*, 278.

4. Where the act provided that the commissioners should levy a special tax on all the real estate in said district, which was taxable by the State and county; *Held*, not to embrace the real estate of schools and railroads, which was not taxable for general purposes. *Ibid.*

5. *Quære?* Whether it is necessary for the justices of the peace to act with the commissioners in levying the taxes for the local improvements under these acts. *Ibid.*

STOCKHOLDER:

1. Where the State is a stockholder in a railroad company, it is bound by the provisions of the charter in the same manner as an individual. It has no advantage as a stockholder on account of its sovereignty, for by becoming such, it lays aside its character as sovereign, and places itself on a footing of equality with the individual stockholders. *Marshall* v. *The Railroad Co.*, 322.

2. The property of a corporation belongs to it, and not to the stockholders. They only have an interest in such property through their relation to the company, and in this respect the State is like any other stockholder. So, where an Act of the General Assembly provided for a sale of the State's interest in a railroad company in which the State was a stockholder, *it was held* to be only a sale of the stock. *Ibid.*

3. Whether such sale would vest in the purchasers of the State's stock all the powers and privileges which the charter of the company had conferred on the State; *quære? Ibid.*

4. An act of the Legislature which provides that, in a certain contingency, the stockholders of an existing corporation shall re-organize as a new corporation, which changes the amount of the capital stock, and provides for the stockholders in the existing corporation by reserving a certain

amount of the stock for them in the corporation to be formed, creates a new corporation, and is not an amendment to the charter of the one already in existence. In such case it is immaterial that the new corporation is called by the same name as the old one. *Ibid.*

5. *Quære*—whether the Legislature has power to compel the stockholders in the old corporation to re-organize as a new company; but if they do so voluntarily, the new corporation is regularly and legally formed. *Ibid.*

SUBROGATION:

The lien of a judgment cannot be continued by subrogation when the judgment has been satisfied, nor against a party who acquired rights before the action in which the judgment of subrogation was rendered was begun, nor can such subrogation impair the rights of persons not parties to the action. *Lowdermilk* v. *Corpening*, 333.

SUMMONS:

1. The office of the summons is to bring the parties into court; the nature of the action is shown by the complaint. *Barneycastle* v. *Walker*, 198.
2. The failure of sheriff to note on summons the day it is received is irregular, but does not render the summons void. *Strayhorn* v. *Blalock*, 202.
3. If it is served less than ten days before return day the action ought not to be dismissed, but further time ought to be allowed defendants to answer. *Ibid.*
4. When the sheriff returns that he has "served" the summons, this is *prima facie* sufficient and implies that he has served it as the statute directs, until the contrary is made to appear in some proper way. *Ibid.*
5. If the service is insufficient the plaintiff is entitled to an *alias*, and it is error to dismiss the action. *Ibid.*
6. By accepting service of the summons, the parties are brought into court and made parties to the action, and must take notice of the proceedings, and are bound by the judgment of the Court. *Stancill* v. *Gay*, 455.
7. A judgment rendered against infant defendants who have never been served with process, and who have no general or testamentary guardian nor guardian *ad litem*, is void. *Stancill* v. *Gay*, 462.
8. The receipt of money under such judgment by the infants, does not give vitality to the judgment. They may be made to account for the amounts received in another action. *Ibid.*
9. *The Code*, sec. 387, making valid judgments against infants and certain other persons, in cases where, being parties defendant, they are not personally served, does not apply to cases where there has never been any service upon the infant, nor upon any person representing him. *Ibid.*
10. An attorney for a foreign corporation, who has claims to collect for them in this State, is not a local agent upon whom a smmmons can be served. *Moore* v. *The Bank*, 590.
11. A local agent of a foreign corporation, upon whom process can be served so as to bring the corporation into court, means an agent residing either permanently or temporarily in this State for the purpose of his agency, and does not include a mere transient agent. *Ibid.*

12. *It seems*, that the affidavit to obtain an order for the publication of a summons, may be made after the order, provided the order remains in abeyance until the affidavit is filed. *Bank* v. *Blossom*, 695.

13. Where notice of an attachment and summons was published in one notice for five weeks, it was held a sufficient publication of the notice of the attachment, but not of the summons. *Ibid.*

14. Where a publication of a summons was only made for five weeks, the Court has power to retain the action and order a sufficient publication. *Ibid.*

SUPPLEMENTAL PROCEEDINGS:

1. Supplemental proceedings are substituted in the present system of procedure for the method of granting relief in equity in the former system, in favor of a judgment-creditor after the remedy at law by execution had been exhausted. They are incidental to the original action, and to accomplish their purpose of reaching the judgment-debtor's property of every kind that cannot for any cause be reached by execution, injunctions may be granted and receivers appointed in them as occasion may require. *Coates* v. *Wilkes*, 377.

2. The appointment of a receiver in these proceedings does not rest solely in the discretion of the Judge, and his action in appointing or refusing to appoint is subject to a review by the Supreme Court. *Ibid.*

3. It is not necessary in order to warrant the appointment of a receiver in such proceedings that it should appear with perfect certainty that the debtor has property which ought to be applied to the payment of the judgment. It is sufficient if there is reasonable ground to believe that he has such property. *Ibid.*

4. The general principles of law applicable to receivers apply to those appointed in supplemental proceedings. It is the duty of such receiver to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. *Ibid.*

5. The motion for such receiver may be made before the Judge, pending an appeal to him from the ruling of the clerk upon other questions. *Ibid.*

6. In application for receivers and injunctions in supplemental proceedings, the Supreme Court will examine the evidence and pass upon the facts. *Ibid.*

7. In supplemental proceedings the evidence should all be taken down in writing. *Ibid.*

8. Where the judgment-debtor is examined, the creditor does not make him his witness, but may cross-examine and contradict him. The provision in The Code, allowing the examination of parties to actions, takes the place of the bill for discovery in the former system of procedure. *Ibid.*

SURETY:

The rule that parol evidence cannot be admitted to contradict a written contract, applies to acttons on the contract itself, but not to such as arise

collaterally out of it. So, where it appeared on the face of a note that certain parties thereto were sureties, in an action for contribution parol evidence is admissible to show that they were really principals. *Williams* v. *Glenn*, 253.

TAX:

1. A sale of land for taxes will not pass the title unless the notice of the levy and sale has first been served upon the delinquent as directed by the revenue law. *Hill* v. *Nicholson*, 24.
2. By delinquent is meant the *legal owner* of the land, and a mortgagee is such legal owner. *Ibid.*
3. The Legislature erected adjoining territory in two counties into a no-fence district, and directed the commissioners of the two counties to erect a fence around said district and to defray the expense by a tax on all the realty in the district. More fencing was required in one county than in the other; *Held*, that a uniform tax on all the realty in the district must be imposed to pay the expense of the fence, irrespective of the amount of fencing required in each county. It is immaterial that parts of two counties are united in creating the district. *Commissioners of Greene* v. *Commissioners of Lenoir*, 180.
4. In such case, where the tax-payers in such district resident in one of the counties have paid more than their proportion of the tax to build the fence, the county commissioners of that county are the proper parties to bring an action to correct the wrong, and when the money is collected, it will be retained as a special credit to each of such tax-payers in a general collection of county taxes. *Ibid.*
5. Under an act of the General Assembly to enable the people of Cumberland county to establish a free bridge over the Cape Fear river, the county authorities are authorized to issue bonds and levy a tax to meet the expenses of the same. *McKethan* v. *Commissioners*, 243.
6. Where the plaintiff alleged that she paid to the sheriff $51.80 for her taxes, and afterwards, on the sheriff's removal from office, that she was forced to pay this sum a second time; *Held*, no cause of action was stated against the county. *Burbank* v. *Commissioners*, 257.
7. Even if the tax collector unlawfully collected this money, it raised no liability on the part of the county. *Ibid.*
8. Where the statute provided that upon the written application of one-fifth of the qualified voters of any district or territory in certain counties, whether the boundaries follow township lines or not, it shall be the duties of the commissioners to submit the question of "Stock Law" or "No Stock Law," and if a majority of the votes shall be in favor of the stock law, a fence shall be built; *Held*, that the commissioners have no power, when several of these districts adjoin each other, to unite them into one territory, provide for the construction of one boundary fence, and assess a uniform tax on all the real property in the several districts so united, to meet the expense of the fence. *Bradshaw* v. *Commissioners*, 278.

9. Where the act provided that the commissioners should levy a special tax on all the real estate in said district, which was taxable by the State and county; *Held*, not to embrace the real estate of schools and railroads, which was not taxable for general purposes. *Ibid.*

10. *Quære*—Whether it is necessary for the justices of the peace to act with the commissioners in levying the taxes for the local improvements under these acts. *Ibid.*

11. A tax is not a debt in the ordinary sense of that word. It is an impost levied by the sovereign for the support of the State, and it is not founded on contract. When the statute prescribed no special manner for their collection, they may be collected by an action at law, but when a method is provided by statute, an action for their collection cannot be maintained. *Gatling* v. *Commissioners*, 536.

12. Where a municipal corporation is indebted to a tax-payer, the latter is not entitled either in law or equity to have the amount due him applied as a set-off or counter-claim against the amount he owes for taxes. *Ibid.*

TAX SALE:

A sale of land for taxes will not pass the title unless the notice of the levy and sale has been first served upon the delinquent as directed by the Revenue law, and by the delinquent is meant the *legal owner* of the land proposed to be sold. A mortgagee is such legal owner, and entitled to have the notice. *Hill* v. *Nicholson*, 24.

TAX TITLE:

1. A sale of land for taxes will not pass the title unless the notice of the levy and sale has been first served upon the "delinquent" as directed by the revenue law. *Hill* v. *Nicholson*, 24.

2. By "delinquent" is meant the *legal owner* of the land proposed to be sold; a mortgagee is such an owner, and entitled to have such notice. *Ibid.*

TENANT:

1. A tenant cannot contest his landlord's title, until he has given up the possession of the land. *James* v. *Russell*, 194.

2. If a lessor enters and dispossesses his tenant after he has taken possession of his term, his remedy is by an action for the *tort*. *Barneycastle* v. *Walker*, 198.

3. There is no implied contract that the lessor will not molest his tenant, but there is an implied condition, upon a breach of which the tenant is discharged from his obligation to pay rent. *Ibid.*

4. A tenant can bring trespass against his landlord for forcibly entering on and breaking his close during the term. *Ibid.*

5. A vendee, under a parol contract to purchase land, is the tenant by sufferance of the vendor. *Dail* v. *Freeman*, 351.

6. Any act done by a tenant which works a permanent injury to the freehold is waste. *Dills* v. *Hampton*, 565.

7. *The Code*, sec. 1062, which makes an injury to a house indictable, does not embrace the case of injury to a building by a lessee during the continuance of his term. *State* v. *Whitener*, 798.

TENANT IN COMMON:

1. An ouster of one tenant in common by another will not be presumed from an exclusive use of the common property and the appropriation of its profits to himself for a less period than twenty years; and the result is not changed when one enters to whom a tenant in common has, by deed, attempted to convey the entire tract. This rule extends to purchaser of the interest of a tenant in common at execution sale, and to his vendees. *Ward* v. *Farmer*, 93.
2. If one tenant in common occupies the common property for twenty years, claiming it as his own, the entry of his co-tenants is tolled. *Gaylord* v. *Respass*, 553.
3. If a tenant in common is in possession under a title independent of the common title, *it seems* that a possession for seven years will bar his co-tenants. *Ibid.*
4. A party by taking a deed from one claimant does not debar himself from setting up a better title derived from some other source. *Ibid.*
5. In case of the common possession by two persons, the ownership draws to it the possession, and it is presumed to be in him who has the title. So, where a ward resided with his guardian on a tract of land in which he had an interest, as tenant in common, his possession is presumed to be in accordance with his title, and there is no adverse possession as against him. *Ibid.*

TRESPASS:

If an overseer of a road takes land for road purposes, without having it condemned, and against the will of the owner, he is a trespasser. *Dills* v. *Hampton*, 565.

TRUSTEE:

1. It is not necessary in substituting one trustee for another in pursuance of sec. 1270 of *The Code*, to require a bond of the substituted trustee. *Strayhorn* v. *Green*, 119.
2. Whether a trustee so substituted shall be required to give bond, rests in the discretion of the court, and upon proper reasons being assigned the court would require a bond to be given, if the nature of the trust required it. *Ibid.*
3. Certain property was conveyed to trustees to receive the profits and pay them over to the *cestui que trust*, beyond the necessary expenses incident thereto. The trustees contracted a debt for repairs, and the creditor filed a mechanic's lien on the property; *Held*, that the trustees had the power, under the provisions of the deed, to make a contract on the credit of the trust property for necessary repairs. *Cheatham* v. *Rowland*, 340.

4. *Held further*, that it was error in the Court below to refuse a judgment to enforce the lien by a sale of the property, until the *cestui que trust* were made parties defendant, and were given an opportunity to be heard. *Ibid.*

5. A mortgagee with power of sale, is a trustee, 1st, to control the property and apply the proceeds to the debt; 2d, to account for any surplus to the mortgagor; and he is held to a strict account. *Gooch* v. *Vaughan*, 610.

TRUSTEE OF AN EXPRESS TRUST:

1. The plaintiff having transferred the claim, upon which this action was subsequently brought, to an attorney at law, for collection, and with directions to him to apply the proceeds to demands which he held for collection against the plaintiff due other parties, the plaintiff cannot maintain an action in his name to recover the sum alleged to be due upon the claims. *Wynne* v. *Heck*, 414.

2. That the effect of the transfer was to vest the ownership of the claim in the attorney, as a "Trustee of an Express Trust," and the action should have been brought in his name alone, or, in conjunction with those of the *cestui que trust*. *Ibid.*

ULTRA VIRES:

It is no defence to an action for a *tort*, that the *tort* complained of resulted from an act, which was *ultra vires*. *Gruber* v. *R. R. Co.*, 1.

UNDERTAKING TO STAY EXECUTION:

1. In an action on a bond given to stay execution on an appeal from a justice's judgment, it is not necessary to allege that the plaintiff had sustained damage on account of the appeal. *McMinn* v. *Patton*, 371.

2. Where the condition of the bond to stay such execution was, that if judgment be rendered against the appellant and execution thereon be returned unsatisfied in whole or in part, the sureties will pay the amount unsatisfied, together with all costs and damages; *Held*, sufficient under the statute. *Ibid.*

3. Before the Act of 1879, ch. 68 (Code, sec. 884), a civil action and not a motion in the cause, was the proper remedy against the sureties to an undertaking to stay execution on an appeal from the judgment of a justice of the peace. *Ibid.*

USURY:

1. Where a mortgagor brings an action to restrain the mortgagee from selling the mortgaged property, on the ground that the debt secured is usurious, an injunction will be refused, if the mortgagee waives the usurious parts of the contract. *Manning* v. *Elliott*, 48.

2. Where a debtor comes into a court of equity, and asks relief against an usurious contract, he must pay the defendant the money justly due him with lawful interest. This rule does not apply when the creditor asks relief. *Ibid.*

3. In the absence of contrary finding, it is presumed that a contract is to be performed in the place where it it executed. *Hilliard* v. *Outlaw*, 266.

4. Whether a contract is usurious, depends upon the law of the place where it is to be performed. *Ibid.*

5. The statute law of another State is a fact to be shown by evidence, and cannot be noticed judicially. *Ibid.*

6. So, where a special verdict found that the contract sued on was an additional consideration for the loan of money, but failed to find that such a transaction was usurious in the State where it was to be performed; *Held*, that the special verdict was defective and a *venire de novo* must be awarded. *Ibid.*

7. A stipulation in a mortgage that the mortgagee should retain, from the proceeds of the sale of the property, "costs and charges, including a commission of five per cent. for making such sale," in addition to the principal and interest then due on the secured debt, is not usurious, in the absence of proof of an usurious intent. *Howell* v. *Pool*, 450

VARIANCE:

1. Indictment charged defendant with removal of part of crop made on the land under a lease executed on 1st November, 1883, and running one year. The proof was that defendant removed part of crop made in 1883, under a lease made in March, 1883; *Held*, that the offence proved is different from that charged in the indictment. *State* v. *Ray*, 810.

2. It is not sufficient to prove an offence of like kind, and treat that as the offence charged; when the facts essential to constitute the offence are numerous, they must be alleged with particularity, and proved as alleged. *Ibid.*

VERDICT:

1. A special verdict must find all the facts necessary to enable the Court to give judgment. *Hilliard* v. *Outlaw*, 266.

2. So, where a special verdict found that the contract sued on was an additional consideration for the loan of money, but failed to find that such a transaction was usurious in the State where it was to be performed; *Held*, that the special verdict was defective and a *venire de novo* must be awarded. *Ibid.*

3. A verdict will be set aside when the issues are framed in such a way that the material facts of the case are left confused and unsatisfactory. *Turrentine* v. *The Railroad*, 638.

VENDOR'S LIEN:

The doctrine of the vendor's lien for unpaid purchase money, has long been repudiated in this State. *White* v. *Jones*, 388.

VESTED RIGHT:

The act of March 25, 1870, which prohibits the sale of the reversionary interest in land charged with the homestead exemption, cannot deprive a creditor of a vested right acquired by docketing his judgment before the act was passed. *Lowdermilk* v. *Corpening*, 333.

VOLUNTARY CONVEYANCE:

1. Where in a voluntary assignment to secure creditors, a debtor has the intent to hinder and delay one certain creditor, the deed is fraudulent and void, although neither the trustee nor the beneficiaries under the deed participated in or knew of such fraudulent intent. *Savage* v. *Knight*, 493.
2. The duty of maintainance which a husband owes to his wife is a sufficient consideration for a voluntary deed of land made by him to her, and a court of equity will sustain such a conveyance, although it is void at law. *Taylor* v. *Eatman*, 601.
3. Where a husband makes a gift of land to his wife, without any valuable consideration, but it is admitted he had no fraudulent intent, and he retains property sufficient to pay all of his debts in existence at the time of the gift, it is not fraudulent as to creditors. *Ibid.*
4. To make a voluntary deed fraudulent as to subsequent purchasers, such purchasers must have paid full value for the land, and must also have purchased without notice of the prior voluntary conveyance. *Ibid.*
5. The registration of the prior voluntary deed, is notice to subsequent purchasers. *Ibid.*

WARRANT:

1. Where a warrant charged two defendants with a violation of a town ordinance by being drunk in a public place in the town; *Held*, that the warrant was fatally defective for joining two defendants charged with an offence which could not be jointly committed. *State* v. *Deaton*, 788.

WARRANTY:

1. Plaintiff brought an action for the price of a cotton press, and the defence was a breach of the warranty that it should be capable of pressing a 500-pound bale of cotton with proper management. The referee found that it was of sufficient power to press a 500-pound bale of cotton, but that careful and intelligent management were essential to its proper working; *Held*, that the capacity of the press to pack a 500-pound bale is purely a question of fact. *Tyson* v. *Tyson*, 288.
2. Where the application for insurance is made a warranty, strict accuracy is not required as to matters of opinion in regard to the value of the property, unless intended to obtain some unfair advantage. *Dupree* v. *Ins. Co.*, 417.
3. When the habendum and warranty clause of a deed are joined, and the intention to convey a fee is clear, the words of inheritance will be so transposed as to connect them with the conveying terms, so as to secure the intended effect of the deed. *Staton* v. *Mullis*, 623.

WASHINGTON, TOWN OF:

The act incorporating the town of Washington (Acts 1846-'47, ch. 199) requires the method of procedure, in levying upon and selling real estate for municipal taxes, to conform to that of the general revenue law in force at the time of the levy and sale. *Hill* v. *Nicholson*, 24.

WASTE:

In this State, any act which works a permanent or present injury to the freehold, is waste. *Dills* v. *Hampton*, 565.

WILL:

1. Where a will, proved in another State, bears the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication; *Held*, inadmissible in evidence. *Hunter* v. *Kelly*, 285.
2. Where a testator devised two-thirds of his entire estate to a party for life, it means two-thirds of his net estate, and it takes effect, in the absence of any express provisions to the contrary in the will, immediately after the time when the law requires the executor to distribute the estate, unless the estate should be sooner settled. *Grant* v. *Edwards*, 442.
3. No wish or direction given by a person as to what should be done after death, unless made in a will, can be legally carried out. *Barbee* v. *Green*, 471.
4. Where an executor proves the will, he cannot elect to take against the will. So, where a testator was indebted to the person he appoints his executor and leaves certain property to the executor in payment of the debt, which proved to be of less in value than the amount of the debt, the executor, after proving the will, cannot elect to assert his rights as a creditor and retain his debt out of other assets of the estate. *Syme* v. *Badger*, 706.
5. It is immaterial that the executor acted under a mistaken idea of the legal consequences of proving the will. *Ibid.*

WITNESS:

1. Where the judgment-debtor is examined, the creditor does not make him his witness, but may cross-examine and contradict him. The provision in The Code, allowing the examination of parties to actions, takes the place of the bill for discovery in the former system of procedure. *Coates* v. *Wilkes*, 376.
2. Where the examination of the debtor shows that his books of account contain evidence material to the investigation he should be required to produce them. *Ibid.*
3. It is incompetent to prove what a witness swore on a former trial, when the witness can, himself, be put on the stand. *Dupree* v. *Ins. Co.*, 417.
4. Where a witness has been questioned in regard to certain matters in his examination in chief, it is discretionary with the Judge whether he will allow further questions to be asked the witness in regard thereto, after the cross-examination has been completed. *Ibid.*
5. A witness who admits that he participated in the perpetration of a fraud, is impeached, and it is competent to corroborate his testimony by evidence of similar statements before made by him. *Davis* v. *Council*, 725.
6. It is incompetent to show what one particular person says of a witness, in attempting to prove character. *State* v. *Gee*, 756.

7. When a witness was not sworn, but the fact was not discovered until after the jury had retired; *It was held*, not to entitle the accused to a new trial, as a matter of law. *Ibid.*

8. When there is a direct conflict between the testimony of a witness and of the defendant, who offers himself as a witness, and evidence is introduced to show the good character of the witness, it is legitimate ground of comment by the solicitor, that no witness was offered to show the good character of the defendant. *State* v. *Davis*, 764.

9. Where a defendant offers himself as a witness, he occupies the same position as any other witness. He is entitled to the same protection and privileges, and is equally liable to be impeached and discredited. *Ibid.*

10. Where a witness has been impeached, in order to corroborate him, he may be allowed to testify to statements made by him about the same matter shortly after it occurred, corroborating his evidence given on the trial. *State* v. *Whitfield*, 831.

11. A witness may be discredited by the nature of his evidence, by the circumstances surrounding him, or by imputations directed against him on cross-examination, as well as by direct evidence introduced to show the untruthfulness of his testimony. *Ibid.*